INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Constitutional provisions and statutes involved	2
Statement	2
1. The Red Cross and its operations	3
2. The present litigation	10
Introduction and summary of argument	11
Argument	14
I. The Red Cross is an instrumentality of the United States and thus, absent express congressional waiver, is immune from the imposition of a State tax on its operations	14
A. The Red Cross acts in close coordination with the United States in performing important governmental duties	16
B. Congress, the President, and the judiciary have long recognized that the Red Cross is an official organ of the United States	23
C. The grounds upon which appellants urge that the Red Cross is not a federal instrumentality are without merit	27
II. Congress has not waived the Red Cross' constitutional immunity from State unemployment taxes	37

235-911—66——1

Argument—Continued
III. The three-judge district court had jurisdiction to enjoin the collection of the Colorado tax from the Red Cross ---------- Page 48
A. Section 1341 of the Judicial Code did not bar the district court from granting an injunction ---------- 48
1. Section 1341 of the Judicial Code does not apply to suits brought by the United States ---------- 48
2. The Colorado courts do not provide a "plain, speedy and efficient remedy" ---------- 50
B. The Eleventh Amendment does not bar the maintenance of this action ---------- 52
C. A three-judge court was properly convened ---------- 52
Conclusion ---------- 54
Appendix ---------- 55

CITATIONS

Cases:

Adams v. *Commissioner*, P.H. Memo, T.C. Dec. par. 63,241 (1963) ---------- 32
Anderson National Bank v. *Luckett*, 321 U.S. 233 ---------- 36
Austin v. *Alderman*, 74 U.S. 694 ---------- 48
Board of Commissioners v. *United States*, 139 F. 2d 248, certiorari denied, 321 U.S. 795 ---------- 49

Cases—Continued

	Page
Bransford, Ex Parte, 310 U.S. 354	53
Brannaman v. *Richlow Manufacturing Co.*, 106 Colo. 317, 104 P. 2d 897	51
Bucklin Coal Mining Co. v. *Unemployment Compensation Commission*, 53 F. Supp. 484	51
Buckstaff Co. v. *McKinley*, 308 U.S. 358	35
Buder, Ex Parte, 371 U.S. 461	53
Butler v. *D. A. Schulte, Inc.*, 67 F. 2d 632	50
California v. *Pacific R.R. Co.*, 127 U.S. 1	14
Chidester v. *United States*, 82 F. Supp. 322	32
City of Detroit v. *Murray Corp.*, 355 U.S. 489	50
City of Springfield v. *United States*, 99 F. 2d 860	49
Clallam County v. *United States*, 263 U.S. 341	14, 36
Corbett v. *Printers & Publishers Corp.*, 127 F. 2d 195	51
Debs, In re, 158 U.S. 564	50
Des Moines Bank v. *Fairweather*, 263 U.S. 103	15
Educational Films Corp. v. *Ward*, 282 U.S. 379	50
Erickson v. *United States*, 264 U.S. 246	52
Federal Power Commission v. *Tuscarora Indian Nation*, 362 U.S. 99	49
First National Bank v. *Anderson*, 269 U.S. 341	15
Georgia R. Co. v. *Redwine*, 342 U.S. 299	52
Gradall v. *United States*, 329 F. 2d 960	25
Granzow v. *United States*, 261 Fed. 172	25

Cases—Continued

	Page
Great Lakes Dredge & Dock Co. v. *Huffman*, 319 U.S. 293	51
Hopkins v. *Southern California Tel. Co.*, 275 U.S. 393, affirmed 13 F. 2d 814	50
Johnson v. *Maryland*, 254 U.S. 51	36
Leiter Minerals, Inc. v. *United States*, 352 U.S. 220	50
McCulloch v. *Maryland*, 4 Wheat. 316	11, 14, 32, 35, 36
Monaco v. *Mississippi*, 292 U.S. 319	51
Nevada-California Electric Corp. v. *Corbett*, 22 F. Supp. 951	51
Nutt v. *Ellerbe*, 56 F. 2d 1058	50
Osborn v. *Bank of the United States*, 9 Wheat. 738	14, 22, 36
Owensboro National Bank v. *Owensboro*, 173 U.S. 664	14, 32
Paul v. *United States*, 371 U.S. 245	53
Procter & Gamble Distributing Co. v. *Sherman*, 2 F. 2d 165	50, 51
Query v. *United States*, 316 U.S. 486	52, 53
Railroad v. *Penniston*, 18 Wall. 5	36
Railway Mail Assoc. v. *Corsi*, 326 U.S. 88	36
Shaw v. *Gibson-Zahniser Oil Corp.*, 276 U.S. 575	14, 22
Southern Ry. Co. v. *Query*, 21 F. 2d 333	50
Standard Oil Co. v. *Johnson*, 316 U.S. 481	12, 14, 15, 22, 36
Sterling v. *Constantin*, 287 U.S. 378	52
Stewart & Co. v. *Sadrakula*, 309 U.S. 94	36
Swift & Co. v. *Wickham*, 382 U.S. 111	53
Thompson v. *Pacific R.R. Co.*, 9 Wall. 579	15, 36
Township of Hillsborough v. *Cromwell*, 326 U.S. 620	51

Cases—Continued

	Page
United States v. *Allegheny County*, 322 U.S. 174	50
United States v. *American Bell Telephone Co.*, 159 U.S. 548	50
United States v. *Arlington County*, 326 F. 2d 929	50
United States v. *Boyd*, 378 U.S. 39	1[illegible]2, 35, 36
United States v. *Bureau of Revenue*, 291 F. 2d 677	48, 50
United States v. *Department of Revenue of State of Ill.*, 191 F. Supp. 723, 725, vacated, 368 U.S. 30	49, 50
United States v. *Georgia Public Service Commission*, 371 U.S. 285	53
United States v. *Hougham*, 364 U.S. 310	52
United States v. *Livingston*, 179 F. Supp. 9, Affirmed *per curiam*, 364 U.S. 281	36, 49, 50
United States v. *Okaloosa County*, 59 F. Supp. 426	49
United States v. *68,716 Square Feet of Land*, 79 F. Supp. 438, affirmed on this point, reversed on other grounds *sub. nom. United States* v. *City of New York*, 175 F. 2d 75 (C.A. 2), certiorari denied, 338 U.S. 885	49
United States v. *Township of Muskegon*, 355 U.S. 484	12
United States v. *United Mine Workers*, 330 U.S. 258	50
United States v. *Woodworth*, 170 F. 2d 1019	48
Young, Ex Parte, 209 U.S. 123	52

Constitution, treaties, and statutes:

	Page
Constitution of the United States: Eleventh Amendment	13, 55
Geneva Convention of August 22, 1864, for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 Stat. 940 (1882), Treaty Series, No. 377	3, 4, 16, 34
Geneva Convention of July 27, 1929, for the Amelioration of the Condition of the Wounded and the Sick of Armies in the Field, 47 Stat. 2074 (1932), Treaty Series, No. 847	4, 16
Geneva Convention for the Multilateral Protection of War Victims, August 12, 1949, 6 U.S. Treaties 3114	4, 16, 17
Act of January 5, 1905, c. 23, 33 Stat. 599	3, 4, 6, 7, 8, 21, 27, 30, 33, 55
Act of March 4, 1915, c. 143, 38 Stat. 1084 (31 U.S.C. 686)	31
Act of May 8, 1947, c. 50, 61 Stat. 180, Sec. 4	4
Act of September 30, 1950, c. 1125 (64 Stat. 1109)	6, 20, 32, 33, 47, 67
Emergency Relief Appropriation Act, Fiscal Year 1941, c. 432, 54 Stat. 611, Sec. 40	8
Internal Revenue Code of 1939, Sec. 3469 (26 U.S.C. 1952 ed.), Sec. 3469)	34
Internal Revenue Code of 1954 (26 U.S.C.):	
Sec. 114	9, 34
Sec. 170	8
Sec. 501	8
Sec. 911	32, 42

Constitution, treaties, and statutes—Continued
Internal Revenue Code of 1954—Con. Page
Sec. 3301 ..... 37, 38, 41, 43, 45, 46
Sec. 3302 38
Sec. 3305 ..... 24, 40, 41, 43, 46, 73
Sec. 3306 ..... 24, 40, 41, 42, 43, 46, 73
Sec. 4253 ..... 9, 34
Sec. 4263 ..... 9, 34
Provisions before the Social Security Amendments of 1960:
Sec. 3305 39
Sec. 3306 ..... 38, 39
P.L. 86-778, 74 Stat. 924, § 531 39
Revenue Act of 1943, c. 63, 58 Stat. 21 (26 U.S.C. 1952 ed., Sec. 3469) 34
Third Supplemental Appropriation for National Defense Act, Fiscal Year 1942, c. 591, 55 Stat. 810, 817 8
Walsh-Healy Act 32
3 Stat. 266 ..... 12, 14
10 U.S.C.:
Sec. 2542 ..... 6, 70
Sec. 2602 ..... 4, 17, 18, 19, 71
Sec. 2670 ..... 6, 72
Sec. 3539 ..... 6, 17, 72
Sec. 4624 ..... 6, 17
Sec. 4625 ..... 6, 17
Sec. 5987 ..... 6, 17, 72
Sec. 9624 ..... 6, 17
Sec. 9625 ..... 6, 17
28 U.S.C.:
Sec. 1341 ..... 13, 48, 49, 50, 51, 74
Sec. 2281 52

Constitution, treaties, and statutes—Continued
Colorado Employment Security Act, 4 Colorado Statutes Annotated:
Page
Sec. 82-1-3 39
Sec. 82-5-1 ..... 2, 39, 74
Sec. 82-5-3 46
Sec. 82-9-9 ..... 51, 75
Miscellaneous:
81 Cong. Rec., Part 3, pp. 1416-1417 49
106 Cong. Rec., Part 10, p. 13,827 ..... 24, 44, 47
112 Cong. Rec. 13,304, 17,807 (daily ed.) 47
Executive Order 8495, 5 F.R. 2682 (1940) 8
Executive Order 8943, 6 F.R. 5910 (1941) 8
12 F.R. 4397 (1943) 34
28 F.R. 348-349 (1963) 34
H. Cong. Res. 232, 70 Stat. B32 ..... 8, 23, 28, 31
H.R. 12580, 86th Cong., 2d Sess. 44, 45
H.R. 15119, 89th Cong., 2d Sess. 47
H. Rep. No. 1025, 85th Cong., 1st Sess., p. 2 46
H. Rep. No. 1503, 75th Cong., 1st Sess., pp. 2-3 ..... 49, 51
H. Rep. No. 1639, 89th Cong., 2d Sess., pp. 8-10 ..... 46, 47
H. Rep. No. 1728, 82d Cong., 2d Sess., pp. 1-2 ..... 24, 28, 31, 34
H. Rep. No. 1799, 86th Cong., 2d Sess., p. 55 ..... 42, 43, 44, 45
H. Rep. No. 3146, 58th Cong., 3d Sess., p. 2 30
Hearings Before the Committee on Ways and Means of the House of Representatives, 89th Cong., 1st Sess., on H.R. 8282 46

Miscellaneous—Continued

Hearings Before the Committee on Finance, United States Senate, 89th Cong., 2d Sess., on H.R. 15119 ---------- Page 46
Joint Resolution of March 7, 1932, c. 72, 47 Stat. 61 ---------- 7
Joint Resolution of July 5, 1932, c. 431, 47 Stat. 605 ---------- 7
Joint Resolution of February 11, 1933, c. 49, 47 Stat. 799 ---------- 7
Mim. 5003, 1940–1 Cum. Bull. 203 ---------- 43
Opinion of the Attorney General of New Mexico, No. 57–239, dated September 24, 1957 ---------- 27
Presidential Proclamations:
President Eisenhower, 69 Stat. pp. C21–22 ---------- 24, 28, 29
President Taft, 37 Stat. 1716 ---------- 28
Rev. Rul. 60–36, 1960–1 Cum. Bul. 279 ---------- 32
S. Rep. No. 460, 83d Cong., 1st Sess., p. 2 ---------- 23
S. Rep. No. 1035, 75th Cong., 1st Sess., p. 2 ---------- 49, 51
S. Rep. No. 2139, 84th Cong., 2d Sess., p. 1 ---------- 23
Sturges, The Legal Status of the Red Cross, 56 Mich. L. Rev. 1 ---------- 26, 29

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 78

DEPARTMENT OF EMPLOYMENT AND BERNARD E. TEETS, EXECUTIVE DIRECTOR OF EMPLOYMENT OF THE DEPARTMENT OF EMPLOYMENT, APPELLANTS

v.

THE UNITED STATES OF AMERICA, AND THE AMERICAN NATIONAL RED CROSS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

BRIEF FOR THE APPELLEES

OPINION BELOW

The findings of fact, conclusions of law and supplemental conclusions of law of the United States District Court for the District of Colorado (R. 20–29) have not been reported.

JURISDICTION

The judgment of the three-judge district court was filed on September 16, 1965 (R. 28). The notice of appeal was filed on November 15, 1965 (R. 30).

On May 23, 1966, this Court postponed further consideration of its jurisdiction until the hearing on the merits (R. 121; 384 U.S. 949). Appellants invoke the jurisdiction of this Court under 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether The American National Red Cross is constitutionally immune, as an instrumentality of the United States, from the Colorado unemployment tax (4 Colo. Rev. Stat. Ann., § 82–6–1).

2. Whether Congress has waived the Red Cross' constitutional immunity from State unemployment taxes.

3. Whether 28 U.S.C. 1341 prevented the district court from entertaining the instant suit on the ground that there was a plain, speedy, and efficient remedy available in the Colorado courts.

4. Whether this suit is barred by the Eleventh Amendment to the Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant provisions of the Constitution of the United States, the Colorado Employment Security Act, and the federal statutes are set forth in the Appendix, *infra*, pp. 55–75.

STATEMENT

This is a direct appeal from the final judgment after trial of a three-judge district court (R. 20–29) enjoining, on constitutional grounds, the collection of Colorado unemployment taxes from The American National Red Cross (Red Cross) and directing a refund of taxes previously collected. The Colorado

Employment Security Act requires employers, including charitable organizations, to pay a tax measured by wages paid to employees. 4 Colo. Rev. Stat. Ann., § 82–6–1. The district court concluded (1) that the Red Cross "is an instrumentality of the United States, and as such is immune from taxation under the Colorado Employment Security Act," and (2) that "the 1960 amendments to the Federal Unemployment Tax Act do not waive the immunity of the Red Cross from taxation" (R. 24–25).

1. THE RED CROSS AND ITS OPERATIONS

The Red Cross, whose genesis goes back to the society founded in 1881 under the leadership of Clara Barton, now exists and operates as a corporation under a federal charter granted by Act of Congress in 1905 (App., *infra*, pp. 55–61).[1] The purposes of this Act, as appears from its preamble as well as its body, were to reincorporate the then existing society, place it under government supervision, and establish the Red Cross as the official organization through which the government would discharge its obligations under the Red Cross Treaty of 1864.[2] The charter was

[1] Act of January 5, 1905, c. 23, 33 Stat. 599 (36 U.S.C. 1–6, 8, 9), hereinafter referred to as Act of 1905.

[2] Geneva Convention of August 22, 1864, for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 Stat. 940 (1882), Treaty Series No. 377. This treaty, *inter alia*, embodied the first international agreement to provide, through both military and civilian effort, care of wounded and sick combatants, irrespective of their nationality, and for conferring neutral and protected status on ambulances, hospitals, and personnel engaged in aiding and caring for the wounded and sick under the Red Cross emblem.

later amended by Congress to designate the Red Cross as the organization that would also discharge the obligations of the United States under "any other treaty or convention similar in purpose to which the United States of America may hereafter give its adhesion" (App., *infra*, p. 62).[3] In addition to the Red Cross Treaty of 1864, these agreements now include the Red Cross Treaty of 1929[4] and the 1949 Geneva Convention for the Multilateral Protection of War Victims.[5]

The Act of 1905 granting the Red Cross a new federal charter also provided for its cooperation with the United States military forces by aiding sick and wounded troops and acting as a medium of communication between the people of the United States and their armed forces (App., *infra*, p. 58). Congress has specifically authorized the President to "employ [the Red Cross] under the armed forces under regulations to be prescribed by the Secretary of Defense."[6] Thereafter the Red Cross made a written tender of services and assistance, the government accepted, and extensive regulations covering Red Cross activities

[3] Act of May 8, 1947, c. 50, 61 Stat. 80, § 4.

[4] Geneva Convention of July 27, 1929, for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, 47 Stat. 2074 (1932), Treaty Series No. 847. This Treaty revised and extended the Red Cross Treaty of 1864 and more specifically recognized the official and protected status of the Red Cross societies duly authorized by their governments to assist in carrying out the latters treaty obligations.

[5] 6 U.S. Treaties 3114; Ex. 1. Pursuant to stipulation between the parties the exhibits have not been printed but both parties may cite and refer to the unprinted portions of the record.

[6] 10 U.S.C. 2602.

were promulgated.[7] The Red Cross has rendered and continues to render substantial services to the military establishment. For example, the armed services rely upon it to make certain investigations for the benefit of servicemen and their dependents. When a serviceman requests compassionate leave, transfer, or discharge—generally because of a personal problem at home—the Red Cross investigates the grounds stated therefor and forwards a report to the commanding officer concerned. Shortly before the time of trial, a daily average of 2,400 communications relating to such requests were being handled by Red Cross. Similarly, when a question arises as to proper diagnosis or treatment of a soldier's mental or physical ailment and the army desires an investigation of the patient's past medical history, the Red Cross conducts it. Again, after an individual has been convicted of a criminal offense by a court martial, the Red Cross makes a report which serves essentially the same purpose as a probation report in a federal criminal court. The Red Cross is the only organization performing these services for the military. R. 64–67, 72–76.

In order to help the Red Cross carry out its aid to the armed services, Congress has authorized the military to make available, without charge, a variety of services, equipment and facilities, including (1) free transportation for both the Red Cross' personnel and its supplies, (2) meals and quarters for Red Cross personnel, without charge if so furnished to civilian employees of the United States, (3) free office space,

[7] R. 46–49, 61–62; Exs. 2, 3, 4, 5, 6, 7.

storage facilities and wharfage for Red Cross personnel and supplies, (4) free use of the military's communications system, (5) assignment of medical officers from the armed services to the Red Cross, and (6) free use of Defense Department equipment for training Red Cross personnel. 10 U.S.C. 2542, 2602, 2670, 3539, 5987 (App. *infra*, pp. 70–72). See also *id.* 4624, 4625, 9624, 9625.

In addition to services to the military, the Act of 1905 provides for the Red Cross "to continue and carry on a system of national and international relief in time of peace and apply the same in mitigating the sufferings caused by pestilence, famine, fire, floods, and other great national calamities, and to devise and carry on measures for preventing the same" (App., *infra*, p. 50). Congress has more recently recognized the Red Cross' extensive role in carrying out disaster relief in the United States. The Federal Disaster Act of 1950[8] (App., *infra*, pp. 67–70) gives the President power to use federal funds, manpower and supplies in cases of major domestic disasters. Under the Act the federal government has primary responsibility for aiding the public sector of a devastated community—*i.e.*, restoring municipal services such as roads and utilities—while primary responsibility for aiding the private sector of the community is reserved to the Red Cross. The Act directs federal agencies to "cooperate to the fullest extent possible with * * * the American National Red Cross," authorizes the

[8] Act of September 30, 1950, c. 1125, 64 Stat. 1109, §§ 1–8 (42 U.S.C. 1855–1855g).

President to give the Red Cross "medicine, food and other consumable supplies" for distribution to the public, and provides that "nothing contained in this Act shall be construed to limit or in any way affect the responsibilities of the American National Red Cross under the Act approved January 5, 1905 * * *" (App., *infra*, pp. 68–69).

The federal government and the Red Cross have entered into a memorandum of understanding defining their respective areas of operation and responsibility under the 1950 Act (R. 79–81; Ex. 8). The memorandum provides, in part, that "The Red Cross will continue to carry out its traditional services to those in need as a result of disasters and "agree[s] to" continue using contributions from the general public "to discharge its responsibilities in disasters" (Ex. 8). As the former Director of the Office of Emergency Planning testified, the disaster activities of the federal executive agencies "as well as the activities of the American National Red Cross are coordinated on behalf of the President by the Director of the Office of Emergeney Planning" (R. 78–79).

The Red Cross has also been used by the federal government for a variety of other important tasks. For example, during the depression, Congress designated the Red Cross as its agency to distribute government-owned wheat and cotton, or food and fabric produced therefrom, to the needy.[9] During and fol-

[9] Joint Resolution of March 7, 1932, c. 72, 47 Stat. 61; Joint Resolution of July 5, 1932, c. 431, 47 Stat. 605; Joint Resolution of February 11, 1933, c. 49, 47 Stat. 799. For a detailed report of these operations see Ex. 21.

lowing World War II the Red Cross was the agency which, pursuant to designation by Congress [10] and President Roosevelt,[11] distributed relief supplies purchased with government funds.[12]

While the Red Cross is primarily dependent on voluntary private contributions of funds and services Congress has granted the Red Cross certain benefits. In addition to services, supplies, equipment and facilities mentioned above (*supra,* pp. 5–6, 6–7), Congress has without charge made government land and buildings available to the Red Cross for its national headquarters,[13] and has supplied the Red Cross with government land on which to build the headquarters of its District of Columbia chapter.[14]

Moreover, the Red Cross has been given a number of benefits under the federal tax laws. Like other charities it is exempt from federal income taxes and contributions to it are tax deductible to a certain extent. 26 U.S.C. 501, 170. However, unlike other charities, it is favored by a special tax provision giving certain types of contributions to the Red Cross more favorable treatment than those to any other or-

---

[10] Emergency Relief Appropriation Act, Fiscal Year 1941, c. 432, 54 Stat. 611, Sec. 40; Third Supplemental Appropriation for National Defense Act, Fiscal Year 1942, c. 591, 55 Stat. 810, 817. See pp. 93 and 95 of Ex. 20 for relevant excerpts.

[11] Executive Order 8495, 5 F.R. 2682 (1940); Executive Order 8943, 6 F.R. 5910 (1941).

[12] See Exs. 19 and 20 for detailed reports of these operations.

[13] App., *infra*, pp. 66–67.

[14] 36 U.S.C., note following § 13.

ganization (including contributions to the State governments and to the United States) (26 U.S. C. 114), and the Red Cross is specifically exempted from liability for certain federal excise taxes on transportation and communications which other governmental and charitable organzations must pay.[15]

One of Congress' purposes in passing the Act of 1905, as expressed in the preamble, was to place the Red Cross "under Government supervision."[16] Congress originally authorized the President to appoint two-thirds of the Red Cross' governing body; by a provision in the original act the number of Presidential appointees was later to be reduced to one-third (App., *infra*, pp. 59–60). A subsequent amendment increased the number of directors to 50 and authorized the President to appoint eight, one of whom the President designates as the principal officer of the Red Cross and the other seven of whom are required to be "officials of departments and agencies of the Federal Government" (App., *infra*, p. 64).

In addition, the Red Cross is required to submit to the Secretary of Defense an annual report of its proceedings and a detailed financial report which is audited by the Department of Defense and transmitted to Congress (App., *infra*, p. 61).

---

[15] 26 U.S.C. 4253(c), 4263(b).

[16] App., *infra*, p. 56. See also H. Rep. No. 3146, 58th Cong., 3d Sess. p. 1 (1904), expressing the importance of bringing the Red Cross under governmental supervision.

2. THE PRESENT LITIGATION.

Appellant Department of Employment, which is responsible for administering the Colorado unemployment tax, determined that the Red Cross was subject to that tax. The Red Cross paid the tax (amounting to well over $10,000) involuntarily and under protest, accompanying such payment with applications for refund. Appellants denied the refunds and threatened to assess interest and penalties and invoke collection remedies against the Red Cross if it did not continue to pay the tax. (R. 16, 17.)

The Red Cross and the United States then instituted this action for a judgment (1) declaring that application of the Colorado Act to the Red Cross is unconstitutional, (2) directing refund to the Red Cross of taxes collected from it, and (3) permanently enjoining further application of the Act to the Red Cross (R. 1–4). The complaint alleged that the Red Cross is a government instrumentality, that it is constitutionally immune from the Colorado unemployment tax and that, contrary to appellants' contention, Congress has never waived that immunity. The United States was made a plaintiff because of its interest in preserving its and its instrumentality's constitutional immunity from state taxation, and in having the relevant provisions of the Internal Revenue Code of 1954 dealing with the imposition of State unemployment taxes upon federal instrumentalities properly construed and applied (R. 3).

After trial,[11] the district court held that it had jurisdiction over the subject matter and all the parties (R. 24). It also concluded that the Red Cross is a government instrumentality whose constitutional immunity from State unemployment taxation Congress has not waived (R. 25), and that the Red Cross' failure to bring suit in the Colorado courts did not preclude it from obtaining relief (R. 27). Accordingly, it entered judgment directing refund of $27,927.79 to the Red Cross and permanently enjoining appellants from applying the Colorado Act to it (R. 29).

INTRODUCTION AND SUMMARY OF ARGUMENT

The central question presented by the instant case is whether the Red Cross is a federal instrumentality and, as such, immune from Colorado unemployment tax. This question arises because the Colorado Act, unlike most state unemployment statutes, does not exempt charities from its application.

It has been established since at least *McCulloch* v. *Maryland,* 4 Wheat. 316, that the federal Constitution prohibits a State from imposing any tax on the federal government and that a portion of such immunity also extends to certain privately owned corporations created by the United States primarily to perform governmental tasks—such as national banks or the

[11] The district court denied both sides' motions for summary judgment (R. 9). Although it first granted appellants' motion to dismiss the United States as a party plaintiff (R. 9), the district court, upon appellees' motion for rehearing, reserved decision on this motion until trial (R. 15, 38). After trial the court concluded that the United States "is a proper party plaintiff to this action" (R. 25).

original Bank of the United States (which was 80 percent privately owned).[18] That is, the States may not impose any tax upon the operations—as distinguished from the property—of corporations or other entities created by the United States primarily to perform governmental functions which "have been so incorporated into the government structure as to become instrumentalities of the United States" (*United States* v. *Boyd,* 378 U.S. 39, 48) or "so assimilated by the Government as to become one of its constituent parts" (*United States* v. *Township of Muskegon,* 355 U.S. 484, 486) or "integral parts" (*Standard Oil Co.* v. *Johnson,* 316 U.S. 481, 485). Of course, Congress may waive the constitutional immunity of a government instrumentality, just as it may forego the immunity of the United States itself. But in the absence of a clear Congressional waiver, such an instrumentality is protected by the Constitution from the imposition of any State tax on its operations—including a State excise tax on the privilege of employing personnel to carry out its governmental functions.

The purposes, organization and operations of the Red Cross require the conclusion—which has frequently been expressed by Congress, by the Executive Branch, and by the lower courts—that the Red Cross is a "quasi-governmental" or "official" agent of the government. The Red Cross was intended to function and has actually functioned as an "arm of the government,"[19] not only in performing its duties

[18] 3 Stat. 266.

[19] *Standard Oil Co.* v. *Johnson, supra,* at 485.

under the various Geneva treaties, but also in rendering aid and assistance to the armed forces in war and peace and to the American public during national disasters. In performing these functions the Red Cross operates hand in hand with the federal government, under governmental supervision, and with substantial governmental support in the form of services, equipment, supplies and facilities. Its operations, therefore, no less than those of national banks and army post exchanges, are immune from State taxation in the absence of congressional consent.

The 1960 amendments to the federal statutes governing unemployment taxes did not waive the Red Cross' constitutional immunity from State unemployment taxes. This is clear from both the text and the legislative history of the amendments. In an exchange, on the floor of the House, between the Chairman of the committee which reported on the amendments here in question and a member of that committee, Chairman Mills acknowledged that it was "not the intention of the bill to remove the present exemption of Red Cross employment from State unemployment taxation." 106 Cong. Rec. 13,827.

Section 1341 of Title 28 does not bar the instant suit. (1) That provision does not apply where, as here, the United States is a party plaintiff. (2) The remedy provided by the Colorado courts is not "plain, speedy and efficient" within the meaning of 28 U.S.C. 1341, since interest is not recoverable on illegally collected Colorado unemployment taxes. Nor does the

Eleventh Amendment preclude the suit. (1) That amendment does not bar suits by the United States against a State. (2) To the extent that the instant suit sought to restrain a public official (appellant Teets) from unconstitutional conduct, it was not a suit against a State and could have been brought by the Red Cross alone.

ARGUMENT

I

THE RED CROSS IS AN INSTRUMENTALITY OF THE UNITED STATES AND THUS, ABSENT EXPRESS CONGRESSIONAL WAIVER, IS IMMUNE FROM THE IMPOSITION OF A STATE TAX ON ITS OPERATIONS

This Court has long recognized that where a federally created entity is organized and operated as an integral part of the federal government, such entity, by force of the Constitution itself, is immune from State taxation on its operations, despite Congressional silence on the point.[20] This is so even if the body is a wholly or predominantly privately owned profit-

---

[20] See, *e.g.*, *McCulloch* v. *Maryland*, *supra*, *Standard Oil Co.* v. *Johnson*, *supra*; *Shaw* v. *Gibson-Zahniser Oil Corp'n.*, 276 U.S. 575, 578–579; and cases cited *infra*, fn. 21. As this Court said in *Callam County* v. *United States*, 263 U.S. 341, 344:

"The immunity is claimed under the Constitution of the United States. It is true that no specific words forbid the tax, but the prohibition established by *McCulloch* v. *Maryland*, 4 Wheat. 316, was established on the ground that the power to tax assumed by the State was in its nature 'repugnant to the constitutional laws of the Union' and therefore was one that under the Constitution the State could not use. 4 Wheat. 425, 426, 430. The immunity is derived from the Constitution in the same sense and upon the same principle that it would be if expressed in so many words. * * *"

making entity."[21] Of course, whether the entity is private or public, whether it is designed to make a profit, and whether it performs extensive nongovernmental activities are all important in determining whether it is actually an instrumentality of the United States.

One of this Court's most recent decisions on the subject involved the status of Army post exchanges. *Standard Oil Co.* v. *Johnson*, 316 U.S. 481. The Court first reviewed the purpose for which these entities had been created and the manner in which they were organized and operated, including the relationship between them and the Department of Defense. The Court also took note of the fact that Congress had frequently recognized that their activities were essentially governmental in nature. The Court then stated (p. 485):

> From all of this, we conclude that post exchanges as now operated are arms of the Government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it, and partake of whatever immunities it may have under the Constitution and federal statutes. * * *

We submit that the purposes, organization and operations of the Red Cross, as well as frequent and

---

[21] See, *e.g.*, *First National Bank* v. *Anderson*, 269 U.S. 341, 347; *Des Moines Bank* v. *Fairweather*, 263 U.S. 103, 106; *Owensboro National Bank* v. *Owensboro*, 173 U.S. 664, 668; *McCulloch* v. *Maryland*, *supra* (involving the original Bank of the United States which was 80% privately owned—3 Stat. 266); *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 860–862; *California* v. *Pacific R.R. Co.*, 127 U.S. 1, 38–42; *Thomson* v. *Pacific R.R. Co.*, 9 Wall. 579, 589.

long-standing congressional, executive, and judicial pronouncements, demonstrate that the Red Cross, like army post exchanges and national banks, is an "arm of the Government." It was organized to and does perform functions which are indispensible to the proper operation of the government. Most of its activities are performed in close coordination with the federal government, which retains significant supervisory powers over the Red Cross. The remainder of its activities constitute preparation for and close support of its duties on behalf of the federal government. It has no private shareholders and no private, profit-making aspects. The entire purpose of the Red Cross is to act as an arm of the federal government by performing governmental functions in close cooperation with the federal government.

A. THE RED CROSS ACTS IN CLOSE COORDINATION WITH THE UNITED STATES IN PERFORMING IMPORTANT GOVERNMENTAL DUTIES

The Red Cross acts as the exclusive representative of the United States in discharging at least three categories of the federal government's duties.

First, Congress has designated the Red Cross as the organization which performs the United States' duties under a series of treaties which have been [redacted] by the President with the consent of the Senate and to which the United States is now an official party.[22] These are the Geneva Convention of 1864, the Red Cross Treaty of 1929 and the Geneva Conference of 1949. Moreover, the Congress has designated the Red Cross "to perform all the duties devolved upon a national society" by any future "treaty or convention similar in purpose to which the United States of

[22] App. *infra*, pp. 55–56, 57–58, 62; see also *supra*, pp. 3–4.

America may hereafter give its adhesion."[23] See R. 39–40, 42, 44; Ex. 1.

To the extent that these activities may include the rendering or supervising of war-time medical care to captured enemy wounded, Congress has authorized the Department of Defense to furnish the Red Cross with a variety of facilities and possibly even with personnel. See 10 U.S.C. 2602, 2670, 3539, 5987, 4624, 4625, 9624, 9625. And, of course, by practical necessity—since the subjects of these services would normally be not only belligerents but also prisoners of the United States Armed Forces—the Red Cross must perform these duties in close coordination with and under the supervision of the United States military authorities.[24] In addition, the American Red Cross may, through or on behalf of the International Committee of the Red Cross, perform treaty duties in relation to captured servicemen—such as inspecting the facilities and treatment given to such prisoners, facilitating communications between them and their families, and transmitting food, medical supplies and clothing to them. These might involve international contacts with various nations and would, of course, be of great concern to our government. Moreover, the Red Cross is responsible for assembling and transporting packages such as food, clothing and medical supplies to captured American troops, and in this endeavor it obtains clothing and other supplies and support as well as transportation services from the

[23] App., *infra*, p. 62.

[24] See Geneva Convention of 1949, Article 26; Ex. 1, p. 20, which provides that in performing such duties Red Cross personnel "are subject to military laws and regulations."

Defense Department.[25] It is thus evident that for the Red Cross successfully to carry out its numerous duties under the treaties signed by the United States, there must be extensive cooperation between the Red Cross and the United States government, and that in carrying out these duties in military theatres of war the Red Cross must operate under the supervision of the armed forces.

Second, pursuant to statutes, regulations, and a written agreement with the military, the Red Cross performs a variety of services which are practically indispensable to the proper daily operation of our armed forces.[26] In both peacetime and wartime the Red Cross maintains an extensive, worldwide system for conducting investigations into servicemen's personal and medical problems at the request of the military authorities. These include investigations and reports needed by the military in making decisions on medical care and treatment (R. 64–65, 75–76), applications for compassionate leave, transfer or discharge (R. 65) and sentencing after conviction by court martial (R. 66). Such services are indispensable to the proper and efficient operation of the military and are rendered neither by any other arm of the military establishment nor by any other non-military organization (R. 64–67). In order for the military to perform these services itself, it would need large additional appropriations from Congress in order to develop a

[25] See generally Exs. 1, 5, 6, 7, 13–18; R. 63, 95; 10 U.S.C. 2602.

[26] See, *e.g.*, 10 U.S.C. 2602; 36 U.S.C. 3; Exs. 2, 3, 4, 5, 6, 7; R. 46–49, 61–62.

nationwide network of volunteers or paid investigators, and, in the opinion of the Senior Advisor to the Assistant Secretary of Defense for Manpower, the military might even then be unable to do the job as well as the Red Cross (R. 66–67, 72–74).

In addition, Red Cross personnel work hand in hand with the military medical authorities in armed forces hospitals. Although some of these services—such as social, counseling and entertainment functions—may be rendered by other organizations as well as the Red Cross (R. 74–75), many of the Red Cross services—especially in time of war are far more extensive than those of other organizations and require the closest degree of cooperation between Red Cross and armed forces medical personnel (R. 64, 70–71, 92–93, 95).

In recognition of the integral relationship between the Red Cross and the Department of Defense and the essentially governmental functions performed by the Red Cross in the military sector, Congress has authorized the President to "employ it [the Red Cross] under the armed forces under regulations to be prescribed by the Secretary of Defense" (10 U.S.C. 2602(a))and has authorized the military to furnish the Red Cross with extensive services, equipment, facilities and personnel."[11] The Red Cross and the President have entered into a formal offer and acceptance of assistance and cooperation, and the armed services have published extensive regulations dealing with the

[11] See discussion, *supra*, pp. 5–6.

allocation of duties between the Red Cross and the military."[28]

Third, the Red Cross performs extensive governmental services in close coordination with the federal government in handling disaster relief. The federal government has undertaken the responsibility of aiding the States in cases of major disasters, such as floods, earthquakes, hurricanes and the like. Nevertheless, Congress withheld from the executive primary responsibility for aiding the thousands of individual disaster victims because it recognized that the Red Cross was, by Congressional direction, already performing these same tasks.[29] Instead, Congress directed that the executive departments of the government "shall cooperate to the fullest extent possible with * * * the American National Red Cross," including providing it with "medicine, food, and other consumable supplies" for distribution to disaster victims (App., *infra,* pp. 68–69).

Pursuant to this Congressional direction, the Red Cross has entered into a memorandum of understanding with the Office of Emergency Planning, which is charged with administering the Federal Disaster Act (R. 79–81). The memorandum recognizes the Red Cross "as the agency responsible for providing mass care to persons immediately following a dis-

[28] Exs. 2, 3, 4, 5, 6, 7.

[29] The Federal Disaster Act emphasizes this point by explicitly providing that "nothing contained in this Act shall be construed to limit or in any way affect the responsibilities of the American National Red Cross under the Act [of] * * * 1905" (App., *infra,* p. 69).

aster," and establishes methods and means of cooperation between the Red Cross and the federal government in order to accomplish this essential task (Ex. 8). It is now the task of the Director of the Office of Emergency Planning, on behalf of the President, to coordinate the joint disaster activities of the Red Cross and the federal executive agencies (R. 78–79). Moreover, when the executive department receives contributions of money from private citizens designated for individual disaster relief, it generally forwards those contributions to the Red Cross as the agency which is primarily responsible for such functions (R. 82, 85).

Even before the Federal Disaster Act, Congress—recognizing that it had in 1905 delegated to the Red Cross the duty "to carry on a system of national and international relief" [30]—used the Red Cross to distribute government-owned or government-financed food, clothing, and supplies, both at home and abroad.[31]

Pursuant to the provision in the Act of 1905 delegating to the Red Cross the task of "devis[ing] and carry[ing] on measures for preventing" "national calamities," [32] it carries on a number of activities designed to prepare for its duties to the military during war and its duties to the public following a disaster. By carrying on an extensive blood collection program, maintaining blood banks and training people in such skills as nursing, first aid and life saving, the Red

[30] App., *infra*, p. 58.
[31] See *supra*, pp. 7–8.
[32] App., *infra*, p. 58.

Cross is prepared to offer the nation effective help in case of disaster or war." (R. 95, 99.)

In summary, it is clear that Congress created the Red Cross to perform and that the Red Cross has in fact performed a number of important governmental duties in close conjunction with the Department of Defense and other federal executive agencies. The continuous close working relationship between the Red Cross and the United States government is and has been at least as intimate as that between the federal government and the national banks and military post exchanges, both of which have been held to be government instrumentalities. Using the language of this Court, the Red Cross' activities are "so intimately connected with the performance of governmental functions" (*Shaw* v. *Gibson-Zahniser Oil Corp.*, 579) and "so incorporated into the government structure as to [make the Red Cross an] instrumentalit[y] of the United States" (*United States* v. *Boyd, supra,* 378 U.S. at 48). Again using this Court's language, the Red Cross is "an integral part of the [executive] Department[s], share[s] in fulfilling the duties entrusted to [them], and partake[s] of whatever immunities [they] have under the Constitution and federal statutes." *Standard Oil Co.* v. *Johnson, supra,* 316 at 485.

---

[28] Even if Congress had not required the Red Cross to engage in these activities, it is clear that a corporation chartered by Congress to perform important governmental functions does not cease to be an instrumentality of the United States merely because it engages in some authorized, but not required, activities. See, *e.g.*, *Osborn* v. *United States Bank, supra,* 9 Wheat. at 860–865.

B. CONGRESS, THE PRESIDENT AND THE JUDICIARY HAVE LONG RECOGNIZED THAT THE RED CROSS IS AN OFFICIAL ORGAN OF THE UNITED STATES

Congress, the President, and the lower courts have often stated that the Red Cross performs important governmental activities as an official agency or instrumentality of the United States or that it has a unique, quasi-governmental status. In a concurrent House-Senate Resolution in 1956 Congress stated that:

> * * * more than fifty years ago the Congress determined that the work of the American National Red Cross was of such importance to the Government and people of the United States * * * that provision should be made for its operation under such grant of authority and such Government supervision as would impart [to it] *official status* * * *.[34]

In addition, the Concurrent Resolution stated that these facts "justified the establishment by the Congress of the American National Red Cross as *the official agent of this Government.*"[35] The Senate Committee Report on this resolution reiterated that "Since 1905 the Red Cross has been incorporated as an *official agency of the United States Government* * * *."[36]

Additionally, when in 1952 Congress, in order to encourage private contributions to the Red Cross, granted a special tax benefit not available to contributors to any other organization, including those to the

[34] H. Cong. Res. 232, 70 Stat. B32 (emphasis added); Ex 30.
[35] *Ibid* (emphasis added).
[36] S. Rep. No. 2139, 84th Cong., 2d Sess., p. 1 (emphasis added). See also S. Rep. No. 460, 83d Cong., 1st Sess., p. 2.

federal and State governments, the House Committee Report stated that:

> The Red Cross has a *unique status* which clearly differentiates it from other charitable organizations. Congress has conferred on the Red Cross a *quasi-governmental status* under legislation which sets forth its principal functions and prescribes its organization and methods of operation. * * * [37]

In the House debates on the 1960 amendments to the federal unemployment compensation statutes (discussed at greater length, *infra*, pp. 43–45), Chairman Mills and Congressman Ikard of the Ways and Means Committee agreed that the Red Cross "has for many purposes been regarded as *an instrumentality of the Federal Government*" and that "the present exemption of Red Cross employment from State unemployment taxation," [38] which arose because it qualified as "an instrumentality of the United States," [39] would continue.

At least eight Presidents have issued proclamations recognizing that the Red Cross is performing essential governmental functions (Exs. 22–29). For example, President Eisenhower has referred to the "Red Cross as this Nation's official volunteer agency." (Ex. 27; 69 Stat. pp. C21–C22). Moreover, in 1918 John W. Davis, who was then Solicitor General and Counselor to the Red Cross, stated that:

---

[37] H. Rep. No. 1728, 82d Cong., 2d Sess., p. 2 (emphasis added) Ex. 33.

[38] 106 Cong. Rec., Part 10, p. 13,827; Ex. 70 (emphasis added).

[39] 26 U.S.C., 1958 ed., 3305(b), 3306(c)(6).

> The American Red Cross is a *quasi-governmental organization*, operating under Congressional charter, officered in part, at least, by governmental appointment, disbursing its funds under the security of a government audit, and designated by Presidential order for the fulfillment of certain treaty obligations into which the government has entered.[40]

Similarly, the federal courts have long recognized that the Red Cross is an instrumentality of the United States. As early as 1919 the Court of Appeals for the Eighth Circuit characterized the Red Cross as "an auxiliary to the armed forces." *Granzow* v. *United States*, 261 Fed. 172, 173. In that case the defendant was charged with violating the Espionage Act and the trial judge charged the jury "that an interference with the Red Cross would be an interference with the operation of the military and naval forces" (pp. 172–173). The court of appeals affirmed the conviction, stating that (p. 173):

> While the Red Cross is not itself within the term "military and naval forces," as used in the statute, yet to cripple the Red Cross as operated in this war is to interfere with such forces. * * *

Much more recently, the Court of Claims referred to the Red Cross as an instrumentality of the United States. *Gradall* v. *United States*, 329 F. 2d 960, 964 (dicta).

A large number of State Attorneys General and other similar officials (including an Assistant At-

[40] Ex. 43 (emphasis added).

torney General of Colorado)[41] have over a long period of years ruled that the Red Cross is an instrumentality of the United States and thus exempt from various State taxes on its operations (including unemployment compensation taxes).[42]

In his exhaustive study, *The Legal Status of the Red Cross*, 56 Mich. L. Rev. 1, the late Professor Wesley A. Sturges concluded that (pp. 17, 29, 30):

> The health and welfare services to be rendered by Red Cross to the armed forces in time of war are unique functions; they are not duplicated by the military establishment; they are not shared by any other government corporation. They put the Red Cross in the position of an auxiliary of the military establishment. * * *
>
> * * * * * *
>
> * * * Red Cross, in the performance of [its] charter powers and duties, will be adjudged to be a specialized, integral unit of the Government of the United States committed to the performance of functions of the government and to be reckoned with accordingly.
>
> * * * * * *
>
> * * * [T]he courts, in the few cases in which Red Cross has been involved, congressional committees, federal tax authorities, and state tax and state regulatory authorities (with a

[41] Attachment 2 to affidavit in support of appellees' motion for summary judgment—unprinted record, p. 14. See stipulation, *supra*, fn. 5, p. 4.

[42] Most of these rulings are considered by Prof. Sturges in his article, discussed *infra*. See also Exs. 45–49, 62, 63, 66, 69 marked for identification but not received in evidence. For similar rulings by the Internal Revenue Service see Exs. 34–39.

> single exception)[43] have been in accord in identifying the corporation as an integral unit of the Government of the United States and engaged in performing functions thereof. * * *

C. THE GROUNDS UPON WHICH APPELLANTS URGE THAT THE RED CROSS IS NOT A FEDERAL INSTRUMENTALITY ARE WITHOUT MERIT

In the face of this strong showing of the Red Cross' close relationship with the federal government and the important governmental functions it performs, the grounds upon which appellants challenge the district court's holding are unpersuasive.

1. Appellants argue that the Red Cross cannot be a government instrumentality because it is not required to perform any government functions, but is merely authorized to do so. The objective evidence does not support this contention. The context and language of the 1905 Act creating the present Red Cross corporation make it abundantly clear that Congress was delegating to the Red Cross "all the duties which have heretofore been performed" by the predecessor Red Cross corporation, including the requirement that it "perform all the duties devolved upon a national society" by the various Red Cross treaties (App., *infra*, p. 58). Moreover, the Federal Disaster Act of 1950 specifically provides that "nothing con-

[43] The sole exception to which Dean Sturges refers is an opinion of the Attorney General of New Mexico which was explicitly overruled a short time thereafter. Opinion of the Attorney General of New Mexico, No. 57-239, dated September 24, 1957, Ex. 53, marked for identification but not received in evidence.

tained in this Act shall be construed to limit or in any way affect the responsibilities of the American National Red Cross under the Act [of] * * * 1905" (App., *infra*, p. 69). A Report of the House Ways and Means Committee two years later states that "Specific duties, such as the furnishing of aid to the sick and wounded of armies in time of war, are imposed upon the Red Cross by statute." H. Rep. No. 1728, 82d Cong., 2d Sess., p. 2. In its 1956 Concurrent Resolution Congress again recognized that it had imposed "duties" upon the Red Cross as an "official agent of this Government". H. Cong. Res. 232, *supra*. Expressions by the Executive Department have been equally clear. In 1911 President Taft directed (37 Stat. 1717):

> That should it be desirable in time of war, or when war is imminent, * * * the Secretary of [War or Navy] is authorized to communicate with the President of the [Red Cross], specifying the character of the services required, and designating the place or places where the personnel and material will be assembled.
>
> That when any member of the American National Red Cross reports for duty with the land or naval forces of the United States, pursuant to a proper call, he will thereafter be subject to military laws and regulations * * *.

In 1955 President Eisenhower stated that the United States had "prescribed * * * duties to be performed by the Red Cross on behalf of the Government and people of the United States * * *." 69 Stat., pp.

C21–C22; Ex. 27. And in 1918 John W. Davis, then Solicitor General and Counselor for the Red Cross, stated (Ex. 43):

> When any question arises as to the scope and activities of the American Red Cross, it must always be remembered that its charter is not only a grant of power but an imposition of duties.

Agreements between the Red Cross and the United States, such as the one discussed *supra*, p. 7, relating to disaster relief, similarly recognize that the Red Cross is "the agency responsible for providing mass care to persons immediately following a disaster" and state that the Red Cross "agree[s] * * * to discharge its responsibilities in disasters" (Ex. 8).

In view of all these facts, it is not surprising that an official of the Red Cross testified at the trial that the Red Cross believes that its charter imposes upon it the duty, not merely the privilege, of providing the services which it renders (R. 91–92), and that all its programs either directly carry out some of its obligations or prepare it to discharge responsibilities which arise in time of emergency (R. 99–101). See also Sturges, *supra*, at 16–17, reaching the same conclusion.

2. Appellants' next contention is that the Red Cross' activities are not sufficiently subjected to governmental supervision and control to make it an instrumentality of the United States. Congress first granted the Red Cross a federal charter in 1900. However, in 1905 Congress decided "that the importance of the work demands a repeal of the present

charter and a reincorporation of the society under Government supervision."[44] Therefore, Congress provided in the new charter that the Red Cross must each year "transmit to the Secretary of War a report of its proceedings * * *, including a full, complete, and itemized report of receipts and expenditures of whatever kind, which report shall be duly audited by the War Department and a copy * * * transmitted to Congress * * *" (App., *infra*, p. 61). This provision remains in full force. In addition, Congress in 1905 gave the President of the United States power to appoint 12 of the 18 members of the Red Cross' governing body, including the chairman.[45] Subsequently, Congress reduced the number of the Red Cross' directors appointed by the President to 8 of the 50 members of the board, one of whom the President designates as Red Cross' principal officer and the other seven of whom are required to be government officials. App., *infra*, p. 64.

Although the President no longer appoints a majority of Red Cross' board of governors, the federal government still maintains ample supervision of and control over the Red Cross' activities through the "specific duties" imposed upon it by Congress, the existing agreements between Red Cross and various

---

[44] App., *infra*, p. 56. See also H. Rep. No. 3146, 58th Cong., 3d Sess., p. 2.

[45] App., *infra*, pp. 59-60. The Act of 1905 further provided that after six Red Cross chapters had been organized, the number of Presidential appointees would be reduced from 12 to 6. *Ibid.*

executive departments, the annual audit of the Red Cross by the Department of Defense, and the facts that Red Cross personnel are subject to Defense Department regulations and, at least in time of war, to the direction of the armed forces in battle areas. Perhaps equally important, if at any time Congress should conclude that the Red Cross was not properly performing its governmental duties, Congress undoubtedly, just as it did in 1905, could repeal the Red Cross' charter, transfer all of its rights, property, and duties to a successor corporation and grant the President power to appoint all or a majority of the new corporation's directors.[46] For these reasons, Congress has recognized several times in the last few years that the Red Cross operates under "such Government supervision as would impart official status." H. Cong. Res. 232, 70 Stat. B 32; Ex. 30. See also, *e.g.*, H. Rep. No. 1728, 82d Cong., 2d Sess., p. 2; Ex. 33.[47]

3. Appellants also argue that Red Cross cannot be a governmental instrumentality because its employees are not employees of the United States. Their reliance on this factor is misplaced, however. The em-

---

[46] See App., *infra*, pp. 58–59; see also App., *infra*, p. 61, where Congress has reserved the right to "repeal, alter, or amend" the Red Cross' charter.

[47] Nor does the requirement that the Red Cross reimburse the Defense Department for auditing its annual reports (App., *infra*, p. 66) militate against the status of the Red Cross as a federal instrumentality. It is usual for a government department, agency or instrumentality to reimburse another department, agency or instrumentality for services or supplies received from it (Act of March 4, 1915, c. 143, 38 Stat. 1084, as amended, 31 U.S.C. 686).

ployees of the thousands of national banks are similarly not the employees of the United States, yet this Court and the Congress have recognized the national banks as tax-immune federal instrumentalities ever since *McCulloch* v. *Maryland*. See *e.g.*, *Owensboro National Bank* v. *Owensboro*, 173 U.S. 664, and cases cited *supra*, n. 21, p. 15.[46]

4. Appellants also cite the section of the Federal Disaster Act which provides that "As used in this Act, * * * 'Federal agency' means any department, independent establishment, Government corporation, or other agency of the executive branch of the Federal Government, excepting, however, the American Na-

---

[46] The fact that employees of a governmental instrumentality which is not owned by the United States will not be regarded as employees of the United States also explains the Secretary of Labor's ruling that the Red Cross is not covered by the Walsh-Healey Act. Appellants' Br. 19. So far as present research discloses, the Secretary of Labor has similarly never attempted to extend the coverage of this act to any other organization which was not owned by the United States, such as a national bank.

Nor are appellants aided by Rev. Rul. 60–36, 1960–1 Cum. Bull. 279. Under 26 U.S.C. § 911, certain citizens of the United States who are living abroad may exclude from their gross income subject to United States income tax certain amounts earned abroad as compensation for personal services. However, this favored treatment does not extend to "amounts paid by the United States or an agency thereof." In Rev. Rul. 60–36 the Commissioner ruled that salary paid by the Red Cross to its employees did not, for this purpose, constitute an amount paid by an agency of the United States. Similarly, amounts paid by national banks to their employees abroad would not come within the statutory phrase. See *Chidester* v. *United States*, 82 F. Supp. 322 (Ct. Cl.) (by implication); *Adams* v. *Commissioner*, P.H. Memo T.C. Dec. par. 63,241 (1963) (by implication).

tional Red Cross" (App. *infra*, p. 68). Rather than reflecting a congressional understanding that the Red Cross is not a federal instrumentality, as appellants suggest, that provision, especially when read in conjunction with the other congressional expressions already discussed, indicates a congressional understanding that the Red Cross might very properly have been deemed embraced by the act's definition of "Federal agency" if not expressly excluded. The Act itself shows that Congress excluded the Red Cross from the definition of federal agency because it wished to deal with the functions and duties of the federal executive agencies separately from those of the Red Cross—giving the former primary responsibility for the public sector and the latter primary responsibility over the private sector. See App., *infra*, p. 69.[49]

5. Nor is there any merit to appellants' claim that the Red Cross cannot qualify as a government instrumentality because it relies mainly on voluntary private contributions. Although Congress decided that the Red Cross should look primarily to the public at large for financial support,[49a] Congress has authorized the federal government to furnish the Red Cross with substantial assistance, such as buildings, supplies, equipment, personnel, transportation, housing and

[49] Appellants suggest that because Congress placed Red Cross' charter in Title 36 of the United States Code, the Red Cross cannot be a federal instrumentality if the other organizations in Title 36—such as the Boy Scouts—are not (Br. 19). Regardless of the minimal weight of this argument, its initial premise is erroneous. Congress neither placed the Red Cross' charter in Title 36 nor has it ever approved the Reviser's action in putting it there.

[49a] See, *e.g.*, H. Cong. Res. 232, *supra*.

communication. See *supra*, pp. 5–6, 6–7, 8. Moreover, Congress has granted the Red Cross several special tax benefits. Before 1944, the Red Cross was regarded as exempt from the federal excise taxes imposed on transportation and communication services because of the general exemption for services furnished to the United States.[50] When Congress repealed this general exemption in 1944, it specifically enacted a new provision exempting such services furnished to "any corporation created by Act of Congress to act in matters of relief under the Treaty of Geneva of August 22, 1864."[51] Additionally, because, as Congress stated, the Red Cross has a "unique * * * quasi-governmental status" (H. Rep. No. 1728, 82d Cong., 2d Sess., p. 2), Congress, in order to encourage private contributions to the Red Cross, granted a special deduction to certain donors to the Red Cross, which is even more favorable than the corresponding deduction for contributions to the State and federal governments. 26 U.S.C. 114. Congress certainly provides for the financial support and assistance of the Red Cross far more than it does for certain other governmental instrumentalities such as national banks. Congress has, through its extensive interest in the Red Cross' financial well-being, demonstrated an awareness that if the Red Cross is unable to obtain sufficient

---

[50] Sec. 3469, Internal Revenue Code of 1939, as amended by § 307(a), Revenue Act of 1943, c. 63, 58 Stat. 21 (26 U.S.C. (1952 ed.) 3469), now Internal Revenue Code of 1954, §§ 4253(c), 4263(b).

[51] Exs. 35, 38, 39. See also 12 F.R. 4397 (1947); 28 F.R. 348–349 (1963).

funds through private contributions or if its funds are drained off for taxes on its operations—either State or federal—the government will have either to perform itself some of the duties now handled by the Red Cross or resort to monetary appropriations to the Red Cross.[52]

6. Finally, appellants' comparison of the Red Cross to a mere government contractor is not apt. The relationship between the United States and a profit-making corporation with which it contracts is frequently brief or, at best, intermittent, and the federal government is typically only one of many customers of such a corporation. As this Court has recognized, when a government contractor performs for the United States, it is still seeking its "own private ends" by carrying on "commercial activities * * * for profit" (*United States* v. *Boyd, supra,* 378 U.S. at 48), and it is still "engaged in its own behalf, not the government's, in the conduct of a private business for profit" (*Buckstaff Co.* v. *McKinley,* 308 U.S. 358, 362). The Red Cross, on the other hand, is a permanent and integral part of the United States govern-

[52] If appellants prevail in the instant case, there would be nothing to prevent a State from burdening the Red Cross with substantial tax liabilities, such as gross and net income taxes, sales and use taxes, and numerous other taxes "on the operation of an instrument employed by the government of the Union to carry its powers into execution." *McCulloch* v. *Maryland, supra,* 4 Wheat. at 436–437.

ment (compare *Standard Oil Co.* v. *Johnson, supra*)[53] and engages in no non-governmental or private profit-making activities.[54] Compare *Clallam County* v. *United States, supra,* 263 U.S. at 345, where the Court held that the corporation in question was an instrumentality of the United States, noting that "This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account."[55]

---

[53] In the *Standard Oil* case the Court, in concluding that post exchanges are governmental instrumentalities, noted that their profits "are used to improve the soldiers' mess, to provide various types of recreation, and in general to add to the pleasure and comfort of the troops" (316 U.S. at 485). The funds and activities of the Red Cross are equally directed toward adding to the pleasure and comfort of the troops in time of war and peace and, in addition, to assisting the general public in case of national disaster.

[54] Moreover, under some circumstances even a government contractor may be a federal instrumentality. See *United States* v. *Livingston*, 179 F. Supp. 9 (E.D.S.C.), affirmed *per curiam*, 364 U.S. 281; *United States* v. *Boyd, supra*, at 45, fn. 6.

[55] Appellants' case is not advanced by reliance on the fact that the Red Cross and its employees are subject to or, as a matter of Red Cross policy, have subjected themselves to various State regulations (R. 105). This Court has recognized that, even though a State may not impose any tax on the operations of a federal instrumentality, it may enforce local regulations which do not impede or burden the instrumentality in the performance of its governmental functions (see, *e.g., Railway Mail Assoc.* v. *Corsi*, 326 U.S. 88, 95; *Anderson National Bank* v. *Luckett*, 321 U.S. 233, 247–253; *Johnson* v. *Maryland*, 254 U.S. 51, 56; see also *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94, 99), and require the payment of a tax on the instrumentality's property as opposed to its operations. See, *e.g., McCulloch* v. *Maryland, supra*, 4 Wheat. at 436–437; *Osborn* v. *Bank of the United States, supra*, at 867; *Thomson* v. *Pacific R.R. Co., supra*, at 589–590; *Railroad Company* v. *Peniston*, 18 Wall. 5, 31.

In sum, in light of the essential governmental duties performed by the Red Cross as an integral part of the federal government, it is an instrumentality of the United States and constitutionally immune from the imposition of a State tax on its operations—including a tax on the privilege of employing people to carry out the duties delegated to it by Congress—unless Congress has explicitly waived such immunity. As we now show, Congress has not done so.

II

CONGRESS HAS NOT WAIVED THE RED CROSS' CONSTITUTIONAL IMMUNITY FROM STATE UNEMPLOYMENT TAXES

Appellants argue that even if (as we contend) the Red Cross is a federal instrumentality, Congress, by the Social Security Amendments of 1960,[*] has waived the constitutional immunity from state unemployment taxes. Br. 37 ff. We submit, however, that a careful analysis of the relevant statutory provisions as they stood before 1960, coupled with an examination of the 1960 amendments in light of their legislative history, demonstrates that Congress has never waived Red Cross' immunity. On the contrary, Congress in passing the legislation recognized that the Red Cross had always been immune from State unemployment taxes and intended specifically to preserve that immunity.

Section 3301 of the Internal Revenue Code imposes a federal excise tax upon employers "with respect to employment," based upon the amount of wages

[*] P.L. 86-778, 74 Stat. 924, § 531.

paid. In general, § 3302 grants the employer a credit (up to 90 percent of the federal tax) for the amount paid to a State unemployment fund which has been approved by the federal government. Section 3306(c) exempts certain employers from the federal tax imposed by § 3301. Before 1960 this section read, in relevant part, as follows:

> § 3306(c). For purposes of this chapter, the term "employment" [as used in § 3301] means any service * * *, except:
>
> * * * * * *
>
> (6) service performed in the employ of the United States Government or of an instrumentality of the United States which is—
>
> (A) wholly owned by the United States, or
>
> (B) exempt from the tax imposed by section 3301 by virtue of any other provision of law;
>
> * * * * * *
>
> (8) service performed in the employ of [a charitable organization] * * *.

Section 3306(c)(8) unquestionally exempted the Red Cross from the federal unemployment tax as a charitable corporation. Additionally, if (as we contend) the Red Cross is an instrumentality of the United States, it would also have been exempted from the federal unemployment tax by § 3306(c)(6), as "an instrumentality of the United States which is * * * exempt from the tax imposed by section 3301 by virtue of" § 3306(c)(8) dealing with charities. Whether the Red Cross was exempted from the *federal* tax under § 3306(c)(6) as well as under § 3306(c)(8) is important in determining whether the Red Cross

could have been required to pay a State unemployment tax. For § 3305, dealing with the power of a State to impose an unemployment tax, provided:

> § 3305(b). The legislature of any State may require any instrumentality of the United States (except such as are (1) wholly owned by the United States, or (2) exempt from the tax imposed by section 3301 by virtue of any other provision of law), and the individuals in its employ, to make contributions to an unemployment fund * * *.

Therefore, if the Red Cross is not an instrumentality of the United States (as appellants contend), no provision of federal law would have prevented a State like Colorado, which taxed both charities and taxable instrumentalities of the United States,[57] from imposing an unemployment tax on the Red Cross. On the other hand, if (as we contend) the Red Cross is an instrumentality of the United States, its constitutional exemption from State unemployment taxes would have been continued by § 3305(b), because it would be an "instrumentality of the United States [which is] * * * exempt from the [federal] tax imposed by section 3301 by virtue of" § 3306(c)(8) relating to charities. With the question of the status of the Red Cross so framed, an Assistant Attorney General of the State of Colorado rendered an advisory opinion that the Red Cross was exempt from the Colorado un-

[57] 4 Colo. Rev. Stat. Ann., §§ 82-6-1, 82-1-3(7)(a), (e)(v).

employment tax as "an instrumentality of the United States."[39]

In 1960 Congress amended §§ 3305 and 3306 to read as follows (italics indicating the material changes):

> § 3305(b). The legislature of any State may require any instrumentality of the United States (*other than an instrumentality to which section 3306(c)(6) applies*), and the individuals in its employ, to make contributions to an unemployment fund * * *.
>
> * * * * *
>
> § 3306(c). For purposes of this chapter, the term "employment" means any service performed * * *, except
>
> * * * * *
>
> (6) service performed in the employ of the United States Government or of an instrumentality of the United States which is—
>
> (A) wholly or partially owned by the United States, or
>
> (B) exempt from the tax imposed by section 3301 by virtue of *any provision of law which specifically refers to such section (or the corresponding section of prior law) in granting such exemption;*
>
> * * * * *
>
> (8) service performed in the employ of [a charitable organization] * * *.

We submit that under the language of these sections, the Red Cross continued to be exempt from

---

[39] See *supra*, fn. 41, p. 26. See also Exs. 66, 69, marked for identification but not received in evidence. While the Colorado opinion, dated November 21, 1960, was promulgated shortly after passage of the 1960 amendments, these amendments did not become effective until January 1, 1962.

State unemployment tax, just as it was before 1960. Moreover, the legislative history of the 1960 amendments clearly demonstrates that Congress did not intend to waive Red Cross' constitutional exemption. We first make a detailed examination of the statutory language, and then discuss the amendments' legislative history.

Section 3305(b), as amended in 1960, would permit Colorado to tax the Red Cross unless it is an organization described in § 3306(c)(6). That section would exempt the Red Cross from State taxation only if it is "an instrumentality of the United States which is * * * exempt from the [federal unemployment] tax imposed by section 3301 by virtue of any provision of law which specifically refers to such section * * *." It is undisputed that § 3306(c)(8) exempts the Red Cross from the federal tax imposed by § 3301 (R. 17, 23). The only dispute on this aspect of the case centers on whether § 3306(c)(8) constitutes a sufficiently specific reference to § 3301.

We submit that it does. Section 3306(c)(8)'s sole purpose is to define those organizations which are exempt from the federal tax imposed by § 3301. It accomplishes this by stating that "For purposes of this chapter" (which includes § 3301) services performed for a charity are not within the meaning of "the term employment" (as used in § 3301). The words "For purposes of this chapter" might not at first glance seem to satisfy the requirement of a "provision of law which specifically refers" to § 3301. But the legislative history of the 1960 amendments shows that

what Congress meant was that in order for an instrumentality of the United States to continue to be exempt from State taxation, there must be a provision of federal law granting it specific immunity from the federal unemployment tax imposed by § 3301, rather than, (as appellants contend), that there must be a specific reference to that section by number. Since § 3306(c)(8) specifically exempts the Red Cross from that tax, it follows that Congress in the 1960 amendments did not waive the Red Cross' constitutional immunity from State unemployment taxes.

The purpose of the 1960 amendment was to terminate the exemption from unemployment tax of a number of federal instrumentalities which were engaged in commercial-type activities, primarily banking.[39] These organizations had all been exempt from

[39] The House Committee Report states in part: "The additional Federal instrumentalities brought under the unemployment compensation program by this change will include the Federal Reserve banks, Federal credit unions, Federal land banks, Federal land bank associations, and Federal home loan banks." H. Rep. No. 1799, 86th Cong., 2d Sess., p. 55.

In considering a closely related question—whether to amend § 3306(c)(8) to impose an unemployment tax on organizations which are owned by a charity but carry on a trade or business for profit—the Ways and Means Committee indicated that the primary concern of the 1960 unemployment tax amendments was to provide coverage for organizations which—like the federal financial institutions listed above—engage in "commercial" "profit-making" activities, "compete on the same terms as private concerns," and the employees of which "are susceptible to the same hazards of unemployment as are the workers in similar establishments not owned by nonprofit organizations." *Id.*, p. 56.

the State unemployment tax because provisions in Title 12, U.S.C. (Banks and Banking), exempted them from State taxes in general.[30] Therefore, Congress in 1960 amended §§ 3305 and 3306 to provide that federal instrumentalities (which were not owned by the United States) could be subjected to State unemployment taxes unless the provision of law which exempted them from State taxation specifically referred to § 3301. The House Committee Report shows that what Congress meant to require was not necessarily a reference to § 3301 by number, but *"a provision of law which grants specific exemption from the Federal unemployment tax"* imposed by § 3301. H. Rep. No. 1799, 86th Cong., 2d Sess., p. 55 (emphasis added). This, of course, the various financial institutions described in the House Committee Report did not have, but by virtue of § 3306(c)(8) the Red Cross did have.

Although the House Committee report does not mention the Red Cross by name as an instrumentality which continued to be exempt from State tax, the Chairman of the Ways and Means Committee (which had reported the bill here in question) expressly acknowledged on the floor of the House during the debate on the bill that "it is not the intention of the bill to remove the present exemption of Red Cross * * * from State unemployment taxation." The full text of the exchange between Chairman Mills and Congressman Ikard, who was a member of the

[30] See Mim. 5003, 1940–1 Cum. Bull. 203.

Ways and Means Committee, is as follows (106 Cong. Rec., Part 10, p. 13,827, emphasis added):

Mr. IKARD. Mr. Chairman, I should like to clarify one particular section of the bill.

Section 531 of the bill—pages 143–146 of H.R. 12580—extends coverage under the unemployment compensation program to employees of certain Federal instrumentalities. The extension will make subject to the Federal unemployment tax any Federal instrumentality which is neither wholly nor partially owned by the United States unless it is exempt from the tax by a specific provision of law. The same section authorizes the legislature of any State to subject employment by such Federal instrumentalities to the State's approved unemployment compensation tax laws. Examples of the Federal instrumentalities thus to be covered are given on page 55 of the committee report on the bill—House Report No. 1799.

My purpose is to make it clear that there is no intention to extend coverage to an organization which is now exempt as a charitable corporation but which also is a Federal instrumentality neither wholly nor partially owned by the United States. The American National Red Cross has for many purposes been regarded as an instrumentality of the Federal Government. However, its exemption from Federal unemployment taxes is presently based on that provision of the statute which specifically exempts service performed in the employ of certain charitable corporations from such taxes. H.R. 12580 continues the exemption from unemployment taxes for such chari-

table corporations; hence the bill is not intended to remove the Red Cross' current exemption. *Similarly, it is not the intention of the bill to remove the present exemption of Red Cross employment from State unemployment taxation.*

Mr. MILLS. Mr. Chairman, will the gentleman yield?

Mr. IKARD. I yield to the gentleman.

Mr. MILLS. The gentleman has very clearly stated, may I say, the understanding that I have of the bill in this respect. Certainly his statement is a very clear reflection of what was intended as far as I am concerned.[81]

Moreover, the House Committee Report states that the bill continues a non-government owned instrumentality's exemption from State unemployment taxation if a statute "enacted before" 1960[82] granted it a "specific exemption from the Federal unemployment tax"[83] imposed by § 3301. However, we have been able to find no non-government owned instrumentality, other than the Red Cross, which, at the time of the 1960 amendments, was specifically exempted from the federal unemployment tax. Therefore, if (as appellants contend) the House Committee did not intend to continue the Red Cross' exemption from State unemployment taxation, the language in the Committee Report regarding specific exemp-

---

[81] Section 531 of H.R. 12580, 86th Cong., 2d Sess., to which the remarks related, was identical with the enacted Section 531.

[82] H. Rep. No. 1799, 86th Cong., 2d Sess., p. 125.

[83] *Id.*, p. 55.

tions from the § 3301 tax "enacted before" 1960 would be meaningless."[64]

Moreover, there was a good reason why Congress did not waive the Red Cross' exemption from State unemployment tax, but rather confined the 1960 amendments to "commercial" organizations the employees of which "are susceptible to the [usual] * * * hazards of unemployment" (See *supra,* fn. 59, p. 42). Most charities—including the Red Cross—have a far lower turnover of employees than do commercial or industrial ventures,[65] while many State unemployment plans do not give adequate weight, especially in the first few years of coverage, to lower-than-average unemployment experience.[66] Therefore, if Congress had waived the Red Cross' exemption in 1960, it would in effect have allowed the States to subsidize local businesses out of Red Cross funds. As Congress has

[64] A 1957 House Committee Report dealing with a somewhat similar proposed amendment to §§ 3305 and 3306, which was not enacted, contains some language indicating that Congress intended to waive the immunity from State taxation of only those financial institutions listed *supra* in fn. 59, p. 42, and other language indicating that the bill would leave no non-government owned instrumentalities immune from State unemployment tax. H. Rep. 1025, 85th Cong., 1st Sess., p. 2. It is apparent that the 1957 Committee—unlike the 1960 Congress which passed the amendment here in question (see *supra,* pp. 44–45)—failed to consider the Red Cross. Since, so far as we can discover, there were no bills introduced on this subject during 1958 and 1959, the 1957 Committee Report is tenuous evidence of the 1960 Congress' intention.

[65] See generally Hearings Before the Committee on Ways and Means of the House of Representatives, 89th Cong., 1st Sess., on H.R. 8282; Hearings Before the Committee on Finance, United States Senate, 89th Cong., 2d Sess., on H.R. 15119; H. Rep. No. 1636, 89th Cong., 2d Sess., pp. 8–10.

[66] See, *e.g.*, 4 Colo. Rev. Stat. Ann. 82–6–3.

more recently stated, charitable organizations "should not be required to share in the costs of providing benefits to workers in profitmaking enterprises." H. Rep. No. 1636, 89th Cong., 2d Sess., p. 9. In fact, in the instant case, over the 3½ year period that Red Cross was paying unemployment taxes to Colorado, it paid $28,332.19 in tax, while its ex-employees received benefits of only $404.40.[67] During the 1966 session of Congress, both Houses passed, in somewhat differing forms, legislation that would have provided State unemployment coverage for charitable organizations including the Red Cross, while permitting each organization to require that its tax be based on its actual experience in employee turnover. Although there was no substantial disagreement with regard to this provision, Congress was unable to reconcile other differences before adjournment and no legislation was enacted.[68] This is the same concept on which benefits to employees of the federal government are paid. 42 U.S.C. 1361, 1366.

In summary, we submit that the 1960 amendments, far from withdrawing the Red Cross' constitutional immunity, reaffirmed "Red Cross' current exemption * * * from State unemployment taxation." 106 Cong. Rec., Part 10, p. 13,827. This conclusion accords with this Court's long-standing admonition that although Congress may waive the Constitutional im-

[67] Although these figures are not shown in the record, they were submitted to the Red Cross by the appellants and used by the parties to compute the judgment of $27,927.79 (*i.e.*, $28,332.19 of tax imposed on the Red Cross less $404.40 of benefits paid to Red Cross' ex-employees) entered by the district court (R. 29).

[68] H.R. 15119 (1966), discussed in H. Rep. No. 1636, *supra*; 112 Cong. Rec. 13,304, 17,807 (daily ed.).

munity of an instrumentality of the United States, "the waiver must be clear, and every well-grounded doubt upon the subject should be resolved in favor of the exemption." *Austin* v. *The Aldermen,* 74 U.S. 694, 699.

III

THE THREE-JUDGE DISTRICT COURT HAD JURISDICTION TO ENJOIN THE COLLECTION OF THE COLORADO TAX FROM THE RED CROSS

A. SECTION 1341 OF THE JUDICIAL CODE DID NOT BAR THE DISTRICT COURT FROM GRANTING AN INJUNCTION

Appellants contend that 28 U.S.C. 1341 (Appendix, *infra,* p. 74) prohibited the district court from enjoining the collection of the Colorado tax from the Red Cross. That Section prohibits the district courts from "enjoin[ing] * * * or restrain[ing] the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." This provision is inapplicable for two reasons: (1) It does not apply to suits brought by the United States. (2) The courts of Colorado do not provide a "plain, speedy and efficient remedy" because they do not allow interest in suits to recover unemployment taxes.

1. *Section 1341 of the Judicial Code Does Not Apply to Suits Brought by the United States.* Every federal court that has passed on the question has held that 28 U.S.C. 1341 is not applicable to suits by the United States to enjoin the unconstitutional imposition of State taxes. *United States* v. *Arlington County,* 326 F. 2d 929, 931 (C.A. 4); *United States* v. *Bureau of Revenue,* 291 F. 2d 677, 679 (C.A. 10); *United States* v. *Woodworth,* 170 F. 2d 1019 (C.A. 2);

Board of Commissioners v. *United States*, 139 F. 2d 248 (C.A. 10), certiorari denied, 321 U.S. 795; *City of Springfield* v. *United States*, 99 F. 2d 860 (C.A. 1), certiorari denied, 306 U.S. 650; *United States* v. *Livingston*, 179 F. Supp. 9, 11 (E.D. S.C.), affirmed *per curiam*, 364 U.S. 281; *United States* v. *Department of Revenue*, 191 F. Supp. 723, 725 (N.D. Ill.), vacated on other grounds, 368 U.S. 30; *United States* v. *68,716 Square Feet of Land*, 79 F. Supp. 438 (S.D. N.Y.), affirmed on this point, reversed on other grounds *sub. nom. United States* v. *City of New York*, 175 F. 2d 75 (C.A. 2), certiorari denied, 338 U.S. 885; *United States* v. *Okaloosa County*, 59 F. Supp. 426 (N.D. Fla.).

This unbroken line of authority is fully supported by the legislative history of 28 U.S.C. 1341, which shows that it was enacted specifically to prevent out-of-state corporations from challenging state and local taxes in lengthy federal court proceedings (not available to citizens of the State) during the pendency of which payment of taxes was withheld. S. Rep. No. 1035, 75th Cong., 1st Sess., p. 2; H. Rep. No. 1503, 75th Cong., 1st Sess., pp. 2–3; 81 Cong. Rec. 1416–1417. The provision does not in terms refer to the United States, and the legislative history contains no intimation of any intent to make it applicable to the Federal government. Accordingly, this is an appropriate situation for application of the settled principle that "general statutes imposing restrictions do not apply to the Government itself without a clear expression to that effect." *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99, 120. This Court has deemed this principle particularly compelling when

the right of the United States to obtain federal injunctive relief is involved. *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220; *United States* v. *United Mine Workers*, 330 U.S. 258; *United States* v. *American Bell Telephone Co.*, 159 U.S. 548.[58a]

2. *The Colorado Courts Do Not Provide a "Plain, Speedy and Efficient Remedy."* Although the basic purpose of Section 1341 is to require taxpayers ordinarily to pay State taxes and then sue in the State court for a refund, it is settled that a State's refund procedure does not afford a "plain, speedy and efficient remedy" unless the judgment will include interest on the illegally-collected taxes, ~~interest will be paid on any judgment rendered~~. *United States* v. *Livingston*, 179 F. Supp. pp. 9, 15 (E.D.S.C.), affirmed *per curiam*, 364 U.S. 281; cf. *United States* v. *Department of Revenue of State of Ill.*, 191 F. Supp. 723, 726–727 (N.D. Ill.), vacated on other grounds, 368 U.S. 30 (no recovery of appeal bond cost). See also *Educational Films Corp.* v. *Ward*, 282 U.S. 379, 386, fn. 2; *Hopkins* v. *Southern California Tel. Co.*, 275 U.S. 393, 399–340, affirming 13 F. 2d 814, 820 (C.A. 9); *Butler* v. *D. A. Schulte, Inc.*, 67 F. 2d 632, 635 (C.A. 5); *Procter*

[58a] The government's standing as a proper party plaintiff, with a right to seek the declaratory and injunctive relief here requested, is clear; the immunity sought to be vindicated is that of the federal government. *United States* v. *Allegheny County*, 322 U.S. 174, 191; *Query* v. *United States*, 316 U.S. 486; see also *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, 503; *United States* v. *Bureau of Revenue*, *supra*. In these circumstances the government need not show any financial interest, direct or indirect, immediate or remote. *United States* v. *Allegheny County*, *supra*; *in re Debs*, 158 U.S. 564, 584; *United States* v. *Arlington County*, 326 F. 2d 929, 931 (C.A. 4).

& Gamble Distributing Co. v. *Sherman,* 2 F. 2d 165, 166 (S.D.N.Y.); *Nutt* v. *Ellerbe,* 56 F. 2d 1058, 1062–1063 (E.D.S.C.); *Southern Ry. Co.* v. *Query,* 21 F. 2d 333, 342–343 (E.D.S.C.).[69] For, as Judge Learned Hand pointed out in *Procter & Gamble Distributing Co., supra,* "a dollar to-day is worth more than a dollar next year," 2 F. 2d at 166.[70]

No interest can be recovered in the Colorado courts in a suit for the refund of illegally collected unemployment taxes. R. 17; 4 Colo. Rev. Stat. Ann. § 82–9–9 (*Appendix, infra,* p 75); *Brannaman* v. *Richlow Manufacturing Co.,* 106 Colo. 317, 104 P. 2d 897. Under the foregoing principles, therefore, the Colorado courts do not provide a "plain, speedy and efficient remedy," and Section 1341 did not bar the district court from enjoining the collection of the State tax.

---

[69] Although these latter cases did not arise under 28 U.S.C. 1341, the general equitable principle that they enunciated is equally applicable here. By use of the traditional equity condition of "plain, speedy and efficient remedy," Congress clearly imported settled principles of federal equity jurisdiction for accommodation of federal and State remedies under 28 U.S.C. 1341. *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U.S. 293, 299; *Township of Hillsborough* v. *Cromwell,* 326 U.S. 620, 622–623. The pertinent committee reports state, in fact, that the provision "does not take away any equitable right of the taxpayer." S. Rep. No. 1035, 75th Cong., 1st Sess., p. 2; H. Rep. No. 1503, 75th Cong., 1st Sess., p. 2.

[70] *Bucklin Coal Mining Co* v. *Unemployment Compensation Commission,* 53 F. Supp. 484 (W.D. Mo.), relied on by appellants, neither considers nor rules on the question. And in *Corbett* v. *Printers & Publishers Corp.,* 127 F. 2d 195, 197 (C.A. 9), and *Nevada-California Electric Corp.* v. *Corbett,* 22 F. Supp. 951, 954 (N.D. Cal.), interest was not denied; its running was merely delayed for up to 30 days.

B. THE ELEVENTH AMENDMENT DOES NOT BAR THE MAINTENANCE OF THIS ACTION

There is no merit in appellants' contention that the instant action is barred by the Eleventh Amendment to the federal Constitution. (Br. 37.) For that Amendment does not bar the United States from suing a State (*Monaco* v. *Mississippi*, 292 U.S. 313, 329), even if another party joins the United States as party plaintiff. *Erickson* v. *United States*, 264 U.S. 246, 249. Moreover, since this is an action to restrain a public official from "invad[ing] rights secured by the Federal Constitution," it is not an action against the State and could be maintained by the Red Cross even if the United States were not a party (*Sterling* v. *Constantin*, 287 U.S. 378, 393; see also *Georgia R. Co.* v. *Redwine*, 342 U.S. 299, 304; *Ex Parte Young*, 209 U.S. 123), even though the Red Cross also sought recovery of taxes already illegally exacted.[11]

C. A THREE-JUDGE COURT WAS PROPERLY CONVENED

In *Query* v. *United States*, 316 U.S. 486, the question was whether an action to enjoin the application of a South Carolina license tax to the activities of an army post exchange was, under the predecessor sec-

[11] Apparently in order to avoid an obligation for postjudgment interest the Colorado Department of Employment has already paid the Red Cross the amount of the district court judgment in the instant case. It is apparent that neither appellants nor appellees intended this payment to constitute an accord and satisfaction, and thus we do not believe that the claim for refund of taxes has become moot. Cf. *United States* v. *Hougham*, 364 U.S. 310, 312–313, and cases cited. In any event the claim for an injunction restraining appellant Teets from attempting to collect further taxes is not moot.

tion of 28 U.S.C. 2281, required to be heard by a three-judge court. In holding that a three-judge court was required, this Court said (pp. 489–490):

> The complainants, asserting that the post exchange is a federal instrumentality to which the statutory consent does not apply, rest their entire case upon a non-statutory ground: the immunity from state taxation which they contend must be given, under the Constitution, to the post exchange as an instrumentality of the United States. And notwithstanding its assertion that only the meaning of the federal statute was involved, the District Court nevertheless found it necessary to include in the opinion accompanying the decree a statement that the threats and attempts to enforce the state statute "constitute an interference with the activities of the United States, and are unconstitutional."
>
> Here a substantial charge has been made that a state statute, as applied to the complainants, violates the Constitution. Under such circumstances, we have held that relief in the form of an injunction can be afforded only by a three-judge court pursuant to § 266. * * *

See, also, *Paul* v. *United States,* 371 U.S. 245, 249–250; *United States* v. *Georgia Public Service Commission,* 371 U.S. 285, 287–288.

Here, as in *Query,* the appellees rely upon their constitutional immunity from taxation rather than upon a statute, and the appellants rely upon an act of Congress to show an alleged waiver of that immunity. The principles applied in *Query* thus are equally applicable here. Unlike *Swift & Co.* v. *Wickham,* 382 U.S. 111, *Ex Parte Bransford,* 310 U.S.

354, and *Ex Parte Buder*, 271 U.S. 461, this case does not involve any issue as to the invalidity under the Supremacy Clause of a State statute because of its conflict with an Act of Congress.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

JACK S. LEVIN,
Assistant to the Solicitor General.

HAROLD C. WILKENFELD,
WILLIAM MASSAR,
Attorneys.

JACK D. HENDERSON,
Attorney for The American National Red Cross.

OCTOBER 1966.

APPENDIX

CONSTITUTION OF THE UNITED STATES OF AMERICA:

Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State.

ACT OF JANUARY 5, 1905, c. 23, 33 Stat. 599:[72]

Whereas on the twenty-second of August, eighteen hundred and sixty-four, at Geneva, Switzerland, plenipotentiaries respectively representing Italy, Baden, Belgium, Denmark, Spain, Portugal, France, Prussia, Saxony, and Wurttemberg and the Federal Council of Switzerland agreed upon ten articles of a treaty or convention for the purpose of mitigating the evils inseparable from war; of ameliorating the condition of soldiers wounded on the field of battle, and particularly providing, among other things, in effect, that persons employed in hospitals and in according relief to the sick and wounded and supplies for this purpose shall be deemed neutral and entitled to protection; and that a distinctive and uniform flag shall be adopted for hospitals and ambulances and convoys of sick and wounded and an arm badge for individuals neutralized; and

Whereas said treaty has been ratified by all of said nations, and by others subsequently, to the number of forty-three or more, including the United States of America; and

[72] The Red Cross' charter, as subsequently amended, now appears in 36 U.S.C. 1–16. See *infra* pp. 61–67 setting forth the sections which have been amended in relevant part.

235-911—66——5

Whereas the International Conference of Geneva of eighteen hundred and sixty-three recommended "that there exist in every country a committee whose mission consists in cooperating in times of war with the hospital service of the armies by all means in its power;" and

Whereas a permanent organization is an agency needed in every nation to carry out the purposes of said treaty, and especially to secure supplies and to execute the humane objects contemplated by said treaty, with the power to adopt and use the distinctive flag and arm badge specified by said treaty in article seven, on which shall be the sign of the Red Cross, for the purpose of cooperating with the "Comité International de Secours aux Militaires Blessés" (International Committee of Relief for the Wounded in War); and

Whereas in accordance with the requirements and customs of said international body such an association adopting and using said insignia was formed in the city of Washington, District of Columbia, in July, eighteen hundred and eighty-one, known as "The American National Association of the Red Cross," reincorporated April seventeenth, eighteen hundred and ninety-three, under the laws of the District of Columbia, and reincorporated by Act of Congress in June, nineteen hundred; and

Whereas it is believed that the importance of the work demands a repeal of the present charter and a reincorporation of the society under Government supervision: Now, therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Clara Barton * * * [and certain other named individuals], together with five other persons to be named by the President of the United States, one to be chosen from each of the Departments of State, War, Navy, Treasury, and Justice,

their associates and successors, are hereby created a body corporate and politic in the District of Columbia.

SEC. 2. That the name of this corporation shall be "The American National Red Cross," and by that name shall have perpetual succession, with the power to sue and be sued in courts of law and equity within the jurisdiction of the United States; to have and to hold such real and personal estate as shall be deemed advisable and to accept bequests for the purposes of this corporation hereinafter set forth; to adopt a seal and the same to alter and destroy at pleasure; and to have the right to have and to use, in carrying out its purposes hereinafter designated, as an emblem and badge, a Greek red cross on a white ground, as the same has been described in the treaty of Geneva, August twenty-second, eighteen hundred and sixty-four, and adopted by the several nations acceding thereto; to ordain and establish by-laws and regulations not inconsistent with the laws of the United States of America or any State thereof, and generally to do all such acts and things (including the establishment of regulations for the election of associates and successors) as may be necessary to carry into effect the provisions of this Act and promote the purposes of said organization; and the corporation hereby created is designated as the organization which is authorized to act in matters of relief under said treaty. In accordance with article seven of the treaty, the delivery of the brassard allowed for individuals neutralized in time of war shall be left to military authority.

SEC. 3. That the purposes of this corporation are and shall be—

First. To furnish volunteer aid to the sick and wounded of armies in time of war, in accordance with the spirit and conditions of the conference of Geneva of October, eighteen hun-

dred and sixty-three, and also of the treaty of the Red Cross, or the treaty of Geneva, of August twenty-second, eighteen hundred and sixty-four, to which the United States of America gave its adhesion on March first, eighteen hundred and eighty-two.

Second. And for said purposes to perform all the duties devolved upon a national society by each nation which has acceded to said treaty.

Third. To succeed to all the rights and property which have been hitherto held and to all the duties which have heretofore been performed by the American National Red Cross as a corporation duly incorporated by Act of Congress June sixth, nineteen hundred, which Act is hereby repealed and the organization created thereby is hereby dissolved.

Fourth. To act in matters of voluntary relief and in accord with the military and naval authorities as a medium of communication between the people of the United States of America and their Army and Navy, and to act in such matters between similar national societies of other governments through the "Comité International de Secours," and the Government and the people and the Army and Navy of the United States of America.

Fifth. And to continue and carry on a system of national and international relief in time of peace and apply the same in mitigating the sufferings caused by pestilence, famine, fire, floods, and other great national calamities, and to devise and carry on measures for preventing the same.

SEC. 4. That from and after the passage of this Act it shall be unlawful for any person within the jurisdiction of the United States to falsely and fraudulently hold himself out as, or represent or pretend himself to be, a member of, or an agent for, the American National Red Cross, for the purpose of soliciting, collecting,

or receiving money or material; or for any person to wear or display the sign of the Red Cross, or any insignia colored in imitation thereof for the fraudulent purpose of inducing the belief that he is a member of, or an agent for, the American National Red Cross. Nor shall it be lawful for any person or corporation, other than the Red Cross of America, not now lawfully entitled to use the sign of the Red Cross, hereafter to use such sign or any insignia colored in imitation thereof for the purposes of trade or as an advertisement to induce the sale of any article whatsoever. If any person violates the provisions of this section, he shall be guilty of a misdemeanor and shall be liable to a fine of not less than one nor more than five hundred dollars, or imprisonment for a term not exceeding one year, or both, for each and every offense. The fine so collected shall be paid to the American National Red Cross.

SEC. 5. That the governing body of the said American National Red Cross shall consist, in the first instance, of a central committee numbering eighteen persons, to be appointed in the manner following, namely: Six by the incorporators herein named and twelve by the President of the United States, one of whom shall be designated by the President to act as chairman. It shall be the duty of the central committee to organize with as little delay as possible State and Territorial societies, including the District of Columbia, under such rules as the said committee may prescribe. When six or more State or Territorial societies have been formed, thereafter the central committee shall be composed as follows: Six to be appointed by the incorporators, six by the representatives of the State and Territorial societies at the annual meeting of the incorporators and societies, and six by the President of the United States, one of whom shall be

designated by him as chairman and one each to be named by him from the Departments of State, War, Navy, Treasury, and Justice.

The first six members of the central committee elected by the incorporators at the first annual meeting, and the first six members of the central committee elected by the State and Territorial delegates, shall when elected select by lot from their number two members to serve one year, two members to serve two years, and two members to serve three years, and each subsequent election of members shall be for a period of three years or until their successors are duly elected and qualify. The six members of the central committee appointed by the President at the annual meeting shall serve for one year.

The President shall fill as soon as may be any vacancy that may occur by death, resignation, or otherwise in the chairmanship or in the membership of the central committee appointed by him. And any vacancy that may occur in the six members of the central committee herein provided to be appointed by the incorporators or in the six to be appointed by the representatives of the State societies shall be filled by temporary appointments to be made by the remaining members of the six in which the vacancy or vacancies may occur, such appointees to serve until the next annual meeting.

The central committee shall have power to appoint from its own members an executive committee of seven persons, five of whom shall be a quorum, who, when the central committee is not in session, shall have and exercise all the powers of the central committee.

The Secretary of War shall within thirty days after the passage of this Act call a meeting at a time and place to be designated by him in the city of Washington of the incorporators hereunder, giving at least thirty days' notice thereof

in one or more newspapers, and the annual meeting of said incorporators, their associates and successors, shall thereafter be held in said city on the first Tuesday after the first Monday in December, the first of said meetings to be held in December, nineteen hundred and five. Fifteen members shall constitute a quorum at any annual or special meeting.

Voting by proxy shall not be allowed at any meeting of the incorporators, annual or special, nor at any meeting of State or Territorial societies organized under the provisions of this charter.

SEC. 6. That the said American National Red Cross shall on the first day of January of each year make and transmit to the Secretary of War a report of its proceedings for the preceding year, including a full, complete, and itemized report of receipts and expenditures of whatever kind, which report shall be duly audited by the War Department, and a copy of said report shall be transmitted to Congress by the War Department.

SEC. 7. That Congress shall have the right to repeal, alter, or amend this Act at any time.

THE PORTIONS OF THE ACT OF 1905 WHICH HAVE BEEN AMENDED IN RELEVANT PART NOW READ AS FOLLOWS (36 U.S.C.):

§1a. CONTINUATION OF CORPORATION; INCORPORATORS; POWERS AND DUTIES.

The corporation now existing as The American National Red Cross under sections 1, 2, 3, 4a—6, 8, and 9 of this title shall continue as a body corporate and politic in the District of Columbia. The first national convention after May 8, 1947 shall be convened and held under rules and regulations prescribed by the governing body of the corporation as presently constituted. After such first national convention,

the Board of Governors of the corporation from time to time shall constitute the associates and successors of the incorporators named in said sections, and neither the said incorporators nor any associates or successors theretofore designated by them or by their successors shall have any powers or duties.

* * * * *

§3. PURPOSES OF CORPORATION.

The purposes of the corporation are and shall be—

First. To furnish volunteer aid to the sick and wounded of Armed Forces in time of war, in accordance with the spirit and conditions of the conference of Geneva of October, eighteen hundred and sixty-three, and also of the treaties of the Red Cross, or the treaties of Geneva, of August twenty-second, eighteen hudred and sixty-four, and July twenty-seventh, nineteen hundred and twenty-nine, to which the United States of America has given its adhesion, and also of any other treaty or convention similar in purpose to which the United States of America may hereafter give its adhesion.

Second. And for said purposes to perform all the duties devolved upon a national society by each nation which has acceded to any of said treaties or conventions.

Third. To succeed to all the rights and property which were prior to January 5, 1905, held and to all the duties which were prior to January 5, 1905, performed by the American National Red Cross as a corporation duly incorporated by Act of Congress June 6, 1900, which Act is repealed and the organization created thereby is dissolved.

Fourth. To act in matters of voluntary relief and in accord with the military authorities as a medium of communication between the peo-

ple of the United States of America and their Armed Forces, and to act in such matters between similar national societies of other governments through the "Comité International de Secours", and the Government and the people and the Armed Forces of the United States of America.

Fifth. And to continue and carry on a system of national and international relief in time of peace and apply the same in mitigating the sufferings caused by pestilence, famine, fire, floods, and other great national calamities, and to devise and carry on measures for preventing the same.

* * * * *

§ 4a. MEMBERSHIP; STATUS OF CHAPTERS; RULES AND REGULATIONS GOVERNING CHAPTERS; ELECTION OF OFFICERS.

Membership in the American National Red Cross shall be open to all the people of the United States, its Territories, and dependencies, upon payment of the sums specified from time to time in the bylaws.

The chapters of the American National Red Cross shall be the local units of the corporation within the States and Territories of the United States. The regulations with respect to the granting of charters to the chapters and the revocation of the same, the territorial jurisdiction of the chapters, the relationship of the chapters to the corporation and compliance by the chapters with the policies and rules of the corporation, shall be as determined from time to time by the Board of Governors. Such regulations shall require that each chapter shall, in the election of the governing body of the chapter and in the selection of delegates to the national convention of the corporation, adhere to democratic principles of election as specified in the bylaws.

235-911—66——6

§ 5. BOARD OF GOVERNORS; NUMBER; ELECTION; TENURE; FILLING VACANCIES; ANNUAL MEETINGS; VOTING BY PROXY.

The governing body of the corporation in which all powers of government, direction, and management of the corporation shall be lodged, shall consist of a Board of Governors numbering fifty persons, to be appointed or elected in the manner following, namely:

(a) Eight Governors shall be appointed by the President of the United States. Of the Governors so appointed, one shall be designated by the President of the United States to act as the principal officer of the corporation with such title and such functions as may from time to time be prescribed in the bylaws; and the remainder shall be officials of departments and agencies of the Federal Government, whose positions and interests are such as to qualify them to contribute toward the accomplishment of Red Cross programs and objectives. Of these at least one and not more than three shall be selected from the armed forces.

(b) Thirty Governors shall be elected by the chapters. The Governors so elected shall be elected at the national convention under procedures for nomination and election which shall be such as to insure equitable representation of all the chapters, having regard to geographical considerations, to the size of the chapters and to the size of the populations served by the chapters.

(c) Twelve Governors shall be elected by the Board of Governors as members-at-large. The Governors so elected shall be individuals who are representative of the national interests which it is the function of the Red Cross to serve, and with which it is desirable that the corporation shall have close association.

The term of office of all Governors shall be three years, except that the term of office of any Governor appointed by the President of the United States (other than the principal officer of the corporation) shall expire if and when such Governor shall retire, prior to the date on which his term as Governor would otherwise expire, from the official position held at the time of his appointment as Governor.

Of the first Board of Governors to be selected hereunder, those Governors to be elected pursuant to subsection (b) of this section shall be elected at the first national convention following May 8, 1947, those Governors to be elected pursuant to subsection (c) of this section shall be elected as soon as practicable following such first national convention, and those Governors to be appointed pursuant to subsection (a) of this section shall be appointed so as to take office at the same time. The Governors so elected pursuant to subsections (b) and (c) of this section shall be divided by lot into three classes, the terms of which shall expire at the end of one, two, and three years, respectively, so that thereafter one-third of the members of the Board of Governors elected pursuant to subsections (b) and (c) of this section will be chosen at the time of each national convention, and shall take office at such time or as soon as practicable thereafter.

The President of the United States shall fill as soon as may be any vacancy that may occur by death, resignation, or otherwise in the office of the principal officer of the corporation or in the membership of the Board of Governors appointed by him. Any vacancy that may occur in the Governors elected by the chapters pursuant to subsection (b) of this section or in the Governors-at-large elected by the Board of Governors pursuant to subsection (c) of this sec-

tion, shall be temporarily filled by appointment made by the Board of Governors, such appointees to serve until the next national convention.

The Board of Governors shall have power (i) to appoint from its own members an executive committee of not less than eleven persons, who, when the Board of Governors is not in session, shall have and exercise all the powers of the Board of Governors, and (ii) to appoint and remove, or provide for the appointment and removal of, all officers and employees of the corporation, except the principal officer designated by the President of the United States.

* * * * *

§ 7. REIMBURSEMENT OF DEPARTMENT OF DEFENSE FOR AUDITING EXPENSES.

The American National Red Cross annually shall reimburse the Department of Defense for auditing its accounts, and the sum so paid shall be covered into the Treasury of the United States as a miscellaneous receipt.

* * * * *

§ 13. PERMANENT BUILDING AT HEADQUARTERS IN WASHINGTON, D.C.

The permanent building erected upon square 172 in the city of Washington, District of Columbia, for the use of the American National Red Cross in connection with its work in cooperation with the Government of the United States shall remain the property of the United States but under the supervision of the Administrator of General Services and the American National Red Cross shall at all times be charged with the responsibility, the care, keeping, and maintenance of said building without expense to the United States.

* * * * *

§ 15. MEMORIAL BUILDING TO WOMEN OF WORLD WAR I; EXPENDITURES; SUPERVISION.

The memorial building to commemorate the services and sacrifices of the patriotic women of the United States of America, of its insular possessions, and of the District of Columbia during the World War, erected on the land occupied in part on June 7, 1924, by the Memorial to the Women of the Civil War, the permanent headquarters of the American Red Cross, shall be used by the American National Red Cross.

The expenditures for said memorial building shall be made under the direction of a commission consisting of the chairman of the Senate Committee on the Library and the chairman of the House Committee on the Library. Said memorial building shall remain the property of the United States Government but under the supervision of the Administrator of General Services, and the American Red Cross shall at all times be charged with the responsibiilty, the care, keeping, and maintenance of the said memorial building without expense to the United States.

* * * * * *

ACT OF SEPTEMBER 30, 1950, c. 1125, 64 STAT. 1109 (FEDERAL DISASTER ACT) (42 U.S.C. 1855g):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the intent of Congress to provide an orderly and continuing means of assistance by the Federal Government to States and local governments in carrying out their responsibilities to alleviate suffering and damage resulting from major disasters, to repair essential public facilities in major disasters, and to foster the development of such State and local organizations and

plans to cope with major disasters as may be necessary.

SEC. 2. As used in this Act, the following terms shall be construed as follows unless a contrary intent appears from the context:

(a) "Major disaster" means any flood, drought, fire, hurricane, earthquake, storm, or other catastrophe in any part of the United States which, in the determination of the President, is or threatens to be of sufficient severity and magnitude to warrant disaster assistance by the Federal Government to supplement the efforts and available resources of States and local governments in alleviating the damage, hardship, or suffering caused thereby, and respecting which the governor of any State (or the Board of Commissioners of the District of Columbia) in which such catastrophe may occur or threaten certifies the need for disaster assistance under this Act, and shall give assurance of expenditure of a reasonable amount of the funds of the government of such State, local governments therein, or other agencies, for the same or similar purposes with respect to such catastrophe;

* * * * *

(f) "Federal agency" means any department, independent establishment, Government corporation, or other agency of the executive branch of the Federal Government, excepting, however, the American National Red Cross.

SEC. 3. In any major disaster, Federal agencies are hereby authorized when directed by the President to provide assistance (a) by utilizing or lending, with or without compensation therefor, to States and local governments their equipment, supplies, facilities, personnel, and other resources, other than the extension of credit under the authority of any Act; (b) by distributing, through the American National Red Cross or otherwise, medicine, food, and

other consumable supplies; (c) by donating to States and local governments equipment and supplies determined under then existing law to be surplus to the needs and responsibilities of the Federal Government; and (d) by performing on public or private lands protective and other work essential for the preservation of life and property, clearing debris and wreckage, making emergency repairs to and temporary replacements of public facilities of local governments damaged or destroyed in such major disaster, and making contributions to States and local governments for purposes stated in subsection (d). The authority conferred by this Act, and any funds provided hereunder shall be supplementary to, and not in substitution for, nor in limitation of, any other authority conferred or funds provided under any other law. Any funds received by Federal agencies as reimbursement for services or supplies furnished under the authority of this section shall be deposited to the credit of the appropriation or appropriations currently available for such services or supplies. The Federal Government shall not be liable for any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Government in carrying out the provisions of this section.

SEC. 4. In providing such assistance hereunder, Federal agencies shall cooperate to the fullest extent possible with each other and with States and local governments, relief agencies, and the American National Red Cross, but nothing contained in this Act shall be construed to limit or in any way affect the responsibilities of the American National Red Cross under the Act approved January 5, 1905 (33 Stat. 599), as amended.

SEC. 5. (a) In the interest of providing maximum mobilization of Federal assistance under this Act, the President is authorized to coordinate in such manner as he may determine the activities of Federal agencies in providing disaster assistance. The President may direct any Federal agency to utilize its available personnel, equipment, supplies, facilities, and other resources, in accordance with the authority herein contained.

(b) The President may, from time to time, prescribe such rules and regulations as may be necessary and proper to carry out any of the provisions of this Act, and he may exercise any power or authority conferred on him by any section of this Act either directly or through such Federal agency as he may designate.

* * * * *

10 U.S.C.:

§ 2542. EQUIPMENT FOR INSTRUCTION AND PRACTICE: AMERICAN NATIONAL RED CROSS.

The Secretary of a military department, under regulations to be prescribed by him, may lend equipment under the jurisdiction of that department that is on hand, and that can be temporarily spared, to any organization formed by the American National Red Cross that needs it for instruction and practice for the purpose of aiding the Army, Navy, or Air Force in time of war. The Secretary shall by regulation require the immediate return, upon request, of equipment lent under this section. The Secretary shall require a bond, in double the value of the property issued under this section, for the care and safekeeping of that property and for its return when required.

* * * * *

§ 2602. AMERICAN NATIONAL RED CROSS: COOPERATION AND ASSISTANCE.

(a) Whenever the President finds it necessary, he may accept the cooperation and assistance of the American National Red Cross, and employ it under the armed forces under regulations to be prescribed by the Secretary of Defense.

(b) Personnel of the American National Red Cross who are performing duties in connection with its cooperation and assistance under subsection (a) may be furnished—

(1) transportation, at the expense of the United States, while traveling to and from, and while performing, those duties, in the same manner as civilian employees of the armed forces;

(2) meals and quarters, at their expense or at the expense of the American National Red Cross, except that where civilian employees of the armed forces are quartered without charge, employees of the American National Red Cross may also be quartered without charge; and

(3) available office space, warehousing, wharfage, and means of communication, without charge.

(c) No fee may be charged for a passport issued to an employee of the American National Red Cross for travel outside the United States to assume or perform duties under this section.

(d) Supplies of the American National Red Cross, including gifts for the use of the armed forces, may be transported at the expense of the United States, if it is determined under regulations prescribed under subsection (a) that they are necessary to the cooperation and assistance accepted under this section.

(e) For the purposes of this section, employees of the American National Red Cross

may not be considered as employees of the United States.

* * * * *

§ 2670. LICENSES: MILITARY INSTALLATIONS; ERECTION, AND USE OF BUILDINGS; AMERICAN NATIONAL RED CROSS.

Under such conditions as he may prescribe, the Secretary of any military department may issue a revocable license to the American National Red Cross to—

(1) erect and maintain, on any military installation under his jurisdiction, buildings for the storage of supplies; or

(2) use, for the storage of supplies, buildings erected by the United States.

Supplies stored in buildings erected or used under this section are available to aid the civilian population in a serious national disaster.

* * * * *

§ 3539. AMERICAN NATIONAL RED CROSS: DETAIL OF OFFICERS OF ARMY MEDICAL SERVICE.

(a) The President may detail not more than five commissioned officers of the Army Medical Service for duty with the Service to the Armed Forces Division of the American National Red Cross.

(b) The Secretary of the Army may detail a commissioned officer of the Medical Corps to be in charge of the first-aid department of the American National Red Cross.

* * * * *

§ 5987. AMERICAN NATIONAL RED CROSS: DETAIL OF OFFICERS IN THE MEDICAL CORPS.

The Secretary of the Navy may detail one or more officers in the Medical Corps of the Navy for duty with the Services to the Armed Forces Division of the American National Red Cross.

INTERNAL REVENUE CODE OF 1954 (26 U.S.C.):

SEC. 3305. APPLICABILITY OF STATE LAW.

* * * * * *

(b) [as amended by Sec. 531(a), Social Security Amendments of 1960, P.L. 86-778, 74 Stat. 924] Federal Instrumentalities in General.—The legislature of any State may require any instrumentality of the United States (other than an instrumentality to which section 3306 (c)(6) applies), and the individuals in its employ, to make contributions to an unemployment fund under a State unemployment compensation law approved by the Secretary of Labor under section 3304 and (except as provided in section 5240 of the Revised Statutes, as amended (12 U.S.C., sec. 484), and as modified by subsection (c)), to comply otherwise with such law. * * *

* * * * * *

SEC. 3306. DEFINITIONS.

* * * * * *

(c) [as amended by Secs. 531(c), 532(a), and 533, Social Security Amendments of 1960, *supra*] *Employment.*—For purposes of this chapter, the term "employment" means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either, (A) within the United States, or (B) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which

and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, except—

* * * * *

(6) service performed in the employ of the United States Government or of an instrumentality of the United States which is—

(A) wholly or partially owned by the United State, or

(B) exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to such section (or the corresponding section of prior law) in granting such exemption;

* * * * *

(8) service performed in the employ of a religious, charitable, educational, or other organization described in section 501(c)(3) which is exempt from income tax under section 501(a);

* * * * *

28 U.S.C.:

SEC. 1341. TAXES BY STATES.

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

COLORADO EMPLOYMENT SECURITY ACT, 4 Colo. Rev. Stat. Ann.:

82-6-1. *Payment.*—(1) Contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this chapter, with respect to wages for employment. Such contributions shall become due and be paid by each employer to the department for

the fund in accordance with such regulations as the commission may prescribe, and shall not be deducted, in whole or in part, from the wages of individuals in such employer's employ.

* * * * *

82–9–9. *Refunds.*—(1) An employing unit may file a written application for refund of money paid erroneously, and if the department shall determine that such payment, or any portion thereof, was paid erroneously, the department shall either issue to the employing unit a credit memo therefor, or make a refund thereof, in either event without interest thereon. In no event may an employing unit recover money paid erroneously or otherwise, which has been paid prior to the first day of January of the first year of the two calendar years immediately preceding the date of the filing of the application for refund. If such application for refund is refused, or if no final action is taken thereon within six months, an employing unit may commence an action in the district court for the city and county of Denver for the collection thereof. In the event of court action no recovery of any money paid prior to the first day of January of the first year of the two calendar years immediately preceding the date of the filing of the application shall be allowed. For like cause and for the same period a recovery as above indicated may be allowed on the department's own initiative.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE:1966

SUPREME COURT OF THE UNITED STATES

No. 78.—October Term, 1966.

Department of Employment et al., Appellants, *v.* United States et al.	On Appeal From the United States District Court for the District of Colorado.

[December 12, 1966.]

Mr. Justice Fortas delivered the opinion of the Court.

Colorado is one of three States[1] whose Employment Security Act imposes an unemployment compensation tax upon charitable institutions, the tax being measured by the amount of wages paid to the institution's employees. 4 Colo. Rev. Stat. Ann. § 82–6–1. When the State's Department of Employment sought to enforce the tax upon wages paid Colorado-based employees of the American National Red Cross (hereinafter referred to as Red Cross), the Red Cross objected that as a "federal instrumentality" it was immune from such taxation. See *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819). Tax payments aggregating more than $10,000 were made under protest, applications for refund accompanying each payment. The Department of Employment denied each such application. Thereupon the Red Cross, along with the United States as co-plaintiff, invoked the jurisdiction of a three-judge federal district court to enjoin enforcement against it of the Colorado Employment Security Act on the ground that as applied to it, a federal instrumentality, the statute violated the

[1] The other States are Alaska and Hawaii. See Alaska Stat. § 23.20.525 (b)(7) (1966); Hawaii Rev. Laws § 93–7 (i) (Supp. 1963).

Federal Constitution. See 28 U. S. C. § 2281.[2] The Department of Employment responded that the Red Cross was not a federal instrumentality, that any immunity it might have had been waived by Congress in the 1960 amendments to the Federal Unemployment Tax Act (26 U. S. C. § 3301 *et seq.*), and that in any event the Red Cross had failed to exhaust available administrative and state judicial remedies. The three-judge federal District Court ruled in favor of the Red Cross and the United States on each of these issues, ordered a refund of taxes already paid, and enjoined enforcement of the tax statute against the Red Cross. Pursuant to 28 U. S. C. § 1253,[3] the Department of Employment and its executive director sought direct review here. In setting the case for argument, we postponed consideration of questions pertaining to our jurisdiction and that of the three-judge court. 384 U. S. 949 (1966).

We are persuaded that there exist no jurisdictional barriers to our disposition of this appeal on the merits. Any challenge to the applicability of the three-judge court provision, 28 U. S. C. § 2281, is foreclosed by this Court's decision in *Query* v. *United States*, 316 U. S. 486 (1942), where the Court held that three judges were required to entertain a suit to enjoin a state tax statute sought to be enforced against an Army Post Exchange

[2] The statute provides that "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State . . . shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

[3] Section 1253 authorizes direct appeal to this Court from an order granting an injunction in any proceeding "required by any Act of Congress to be heard and determined by a district court of three judges."

which asserted its immunity as a federal instrumentality,[4] and we do not consider that our later decision in *Swift & Co.* v. *Wickham*, 382 U. S. 111 (1965), requires a different conclusion. Nor is there compelling force in the argument, advanced by appellants, that the Tax Injunction Act (28 U. S. C. § 1341)[5] requires appellees, first, to exhaust their state remedies, which are alleged by appellants to be "plain, speedy and efficient." We need not decide whether omission to provide interest on a successful refund application renders the state remedy here an inadequate one within the meaning of § 1341. For we conclude, in accord with an unbroken line of authority[6] and convincing evidence of legislative purpose,[7] that § 1341 does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions. With respect to

---

[4] See also *United States* v. *Georgia Pub. Serv. Comm'n*, 371 U. S. 285, 287 (1963); *Paul* v. *United States*, 371 U. S. 245, 249–250 (1963). Compare Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 37–50 (1964), with Note, The Three-Judge District Court: Scope and Procedure Under Section 2281, 77 Harv. L. Rev. 299, 312–313 (1963).

[5] Section 1341 provides that "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

[6] *United States* v. *Arlington County, Commonwealth of Virginia*, 326 F. 2d 929, 931 (C. A. 4th Cir. 1964); *United States* v. *Bureau of Revenue of State of N. M.*, 291 F. 2d 677, 679 (C. A. 10th Cir. 1961); *United States* v. *Woodworth*, 170 F. 2d 1019 (C. A. 2d Cir. 1948); *City of Springfield* v. *United States*, 99 F. 2d 860, 862 (C. A. 1st Cir. 1938), cert. denied, 306 U. S. 650 (1939); *United States* v. *Livingston*, 179 F. Supp. 9, 11–12 (D. C. E. D. S. C. 1959), aff'd, 364 U. S. 281 (1960).

[7] See S. Rep. No. 1035, 75th Cong., 1st Sess., pp. 2–3 (1937); H. R. Rep. No. 1503, 75th Cong., 1st Sess., pp. 2–3 (1937); 81 Cong. Rec. 1416–1417 (1937).

appellants' contention that the State of Colorado has not consented to suit in a federal forum even where plaintiff is the United States, see *Monaco* v. *Mississippi*, 292 U. S. 313 (1934), and *Ex parte Young*, 209 U. S. 123 (1908).

On the merits, we hold that the Red Cross is an instrumentality of the United States for purposes of immunity from state taxation levied on its operations, and that this immunity has not been waived by congressional enactment. Although there is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality, the Red Cross is clearly such an instrumentality. See generally, Sturges, The Legal Status of the Red Cross, 56 Mich. L. Rev. 1 (1957). Congress chartered the present Red Cross in 1905, subjecting it to governmental supervision and to a regular financial audit by the Defense, then War, Department. 36 U. S. C. § 1 *et seq.* Its principal officer is appointed by the President, who also appoints seven (all government officers) of the remaining 49 Governors. 36 U. S. C. § 5. By statute and Executive Order there devolved upon the Red Cross the right and the obligation to meet this Nation's commitments under various Geneva Conventions,[8] to perform a wide variety of functions indispensable to the workings of our Armed Forces around the globe,[9] and to assist the Federal Government in providing disaster assistance to the States in time of need.[10]

[8] *E. g.*, Geneva Convention of August 22, 1864, For the Amelioration of the Condition of the Wounded in Armies in the Field, 22 Stat. 940 (1882); Geneva Convention of July 27, 1929, For the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, 47 Stat. 2074 (1932); Geneva Convention of August 12, 1949, For the Multilateral Protection of War Victims, 6 U. S. T. & O. I. A. 3114.

[9] See, *e. g.*, 10 U. S. C. § 2602; 36 U. S. C. § 3.

[10] See 36 U. S. C. § 3; 42 U. S. C. §§ 1855–1855g.

Although its operations are financed primarily from voluntary private contributions, the Red Cross does receive substantial material assistance from the Federal Government.[11] And time and time again, both the President and the Congress have recognized and acted in reliance upon the Red Cross' status virtually as an arm of the Government.[12] In those respects in which the Red Cross differs from the usual government agency—*e. g.*, in that its employees are not employees of the United States, and that government officials do not direct its everyday affairs—the Red Cross is like other institutions—*e. g.*, national banks—whose status as tax-immune instrumentalities of the United States is beyond dispute.

Nor did Congress, in the course of amending the federal unemployment compensation tax statute in 1960, strip away any of this immunity. Certainly there was no intent to do so. Indeed, in debate on the floor of the House, Chairman Mills and Congressman Ikard of the Ways and Means Committee expressed their view, which was not controverted, that the Red Cross' immunity from state and federal unemployment compensation taxes would survive the amendments. 106 Cong. Rec. 13,827 (1960). And the House Committee Report stated that no nongovernment-owned instrumentality which enjoyed immunity from the federal tax prior to 1960—the Red Cross had such an exemption—was to lose its state-tax immunity. H. R. Rep. No. 1799, 86th Cong., 2d Sess., pp. 55–56, 125 (1960). Finally, the present statutory scheme does not deprive the Red Cross of immunity. That the Red Cross enjoyed immunity prior to the 1960 amendments seems clear, and

---

[11] See, *e. g.*, 36 U. S. C. § 13 (permanent headquarters building).

[12] See, *e. g.*, Proclamation of President Taft, August 22, 1911, 37 Stat. 1716; 42 U. S. C. §§ 1855a (f), b, c; H. Cong. Res. 232, 70 Stat. B. 32 (1956); H. R. Rep. No. 1728, 82d Cong., 2d Sess., p. 2 (1952).

was at the time conceded by the State of Colorado.[13] Under the pre-existing scheme, § 3305 (b) of Title 26 exempted from state taxation any federal instrumentality exempt from the federal unemployment compensation tax imposed by § 3301. The Red Cross was so exempt as the result of §§ 3306 (c)(6)(B) and 3306 (c)(8), which referred to "service performed in the employ of [a charitable organization]." As amended in 1960, § 3305 (b) continues the state-tax immunity for any "instrumentality to which section 3306 (c)(6) applies." And the later section as amended includes employment "exempt from the tax imposed by section 3301 by virtue of any provision of law which specifically refers to such section . . . in granting such exemptions." 26 U. S. C. § 3306 (c)(6)(B). Although § 3306 (c)(8) which exempts from the federal tax "service performed in the employ of a [charitable institution]," does not contain an explicit citation to § 3301, its sole function is to exempt certain employment from the reach of that section. We hold that federal instrumentalities like the Red Cross, exempted from the federal tax by virtue of § 3306 (c)(8), are likewise exempt from state taxation under § 3306 (c)(6)(B).

Accordingly, the judgment appealed from is

Affirmed.

---

[13] Such was the opinion of Assistant Attorney General McKevitt, who so informed appellant Department of Employment. See letter of the Assistant Attorney General to appellee Red Cross, dated November 21, 1960, exhibit 2, in support of appellee's motion for summary judgment below.